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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 34

GEORGE HARRIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 28, 1945.

CERTIORARI GRANTED JUNE 10, 1946.

United States Circuit Court of Appeals

TENTH CIRCUIT

No. 3105

GEORGE HARRIS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

FILED APRIL 3, 1945.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the September Term, 1945, of said Court, before Honorable Alfred P. Murrah, Circuit Judge, and Honorable Eugene Rice and Honorable Royce H. Savage, District Judges.

On the 3rd day of April, A. D. 1945, a transcript of the record, pusuant to a notice of appeal, filed in the District Court of the United States for the Western District of Oklahoma, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein George Harris was appellant, and United States of America was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, is in the words and figures following:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE STEPHEN S. CHANDLER, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

UNITED STATES OF AMERICA, PLAINTIFF,

v.

GEORGE HARRIS, DEFENDANT.

No. 14695

Indictment.

Violation: Section 100, Title 18, U.S.C.A. Section 101, Title 18, U.S.C.A. Section 311, Title 50, App. U.S.C.A. Selective Service Act of 1940 Regulations 623.61-2.

1 At the January 1944 Term of the District Court, of the United States for the Western District of Oklahoma, begun and held at city of Oklahoma City in said district, on the 3d day of January in the year of our Lord one thousand nine hundred forty-four the Grand jurors of the United States of America, within and for said District, having been duly summoned, impaneled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Oklahoma, upon their oath aforesaid, in the name and by the authority of the United States of America, find and present:

Count One.

Theft of Government Property.

2 That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and with-

in the jurisdiction of this Court, one George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously take, steal and purloin eight (8) Notice of Classification cards DSS Form 57 and eleven (11) blank Registration Certificates, DSS Form 2, from the offices of Local Draft Board No. 7 of Oklahoma County, Oklahoma, located at 825 Cotton Exchange Building, Oklahoma City, then and there being the property of the United States of America, and furnished and to be used by Local Draft Board No. 7 Oklahoma County, Oklahoma, with the intent on the part of said George Harris to convert the same to his own use and benefit and to deprive the United States permanently thereof:

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Two.

Receive and Conceal Government Property.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact date being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously conceal eight (8) Notice of Classification cards DSS Form 57 and eleven (11) Registration Certificates, DSS Form 2, property of the United States Government, sealed in an envelope on which he had written: "George Harris Personal Papers", and hidden in the second drawer of a small bureau in a bedroom of an apartment occupied by George Harris at 2308 Northwest Edison Street, Oklahoma City, Oklahoma, which said property had been stolen or purloined from Local Draft

Board No. 7, Oklahoma City, Oklahoma County, Oklahoma, which the said George Harris knew at all of the times said property was concealed by him;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Three.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact date being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously have and retain in his possession, with the intent to convert to his own use and gain, eight (8) Notice of Classification cards DSS Form 57 and eleven (11) Registration Certificates DSS Form 2, property of the United States Government, sealed in an envelope on which he had written, "George Harris Personal Papers"; and hidden in the second drawer of a small bureau in a bedroom of an apartment occupied by George Harris at 2308 Northwest Ellison Street, Oklahoma City, Oklahoma, which said property had been stolen or purloined from Local Draft Board No. 7, Oklahoma City, Oklahoma County, Oklahoma, which the said George Harris knew at all the times said property was retained by him;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count Four.

And the Grand Jurors aforesaid, upon their oaths, in the name and by authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western district of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously falsely make, alter, forge or counterfeit a Notice of Classification card DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by stamping on said card the following words:

4 Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and counterfeiting said Notice of Classification card, DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count Five.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the *authority* of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then

and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously falsely make, alter, forge or counterfeit a Notice of Classification card DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by stamping on said card the following words:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and counterfeiting said Notice of Classification card, DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count Six.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously falsely make, alter, forge or counterfeit a Notice of Classification card, DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by stamping on said card the following words:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and counterfeiting said Notice of Classification card, DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count Seven.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously make, alter, forge or counterfeit a Notice of Classification card, DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by stamping on said card the following words:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and

counterfeiting said Notice of Classification card, DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count Eight.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unalwfully, willfully, knowingly, fraudulently and feloniously falsely make, alter, forge or counterfeit a Notice of Classification card, DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof, by stamping on said card the following words:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and counterfeiting said Notice of Classification card DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

7 Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and

regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count Nine.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously falsely make, alter, forge or counterfeit a Notice of Classification card, DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof, by stamping on said card the following words:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma.

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and counterfeiting said Notice of Classification card, DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count Ten.

And the Grand Jurors aforesaid, upon their oaths, in the

name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown,
8 then and there being, did then and there unlawfully, knowingly, fraudulently and feloniously falsely make, alter, forge or counterfeit a Notice of Classification card, DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by stamping on said card the following words:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and counterfeiting said Notice of Classification card, DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count Eleven.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indict-

ment, at Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, willfully, knowingly, fraudulently and feloniously falsely make, alter, forge or counterfeit a Notice of Classification card, DSS Form 57, property of the United States Government, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by stamping on said card the following words:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

without the knowledge and consent of the United States Government, or Local Draft Board No. 7 of Oklahoma County, Oklahoma, thus and thereby falsely altering, forging and counterfeiting said Notice of Classification card, DSS Form 57, inasmuch as the stamping thereon of said words and figures was incorrect, inaccurate and was not the correct words and figures in use by said board for stamping said card;

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count XII.

9 And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present;

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain

in his possession, with the intent to utter or publish as true, a falsely altered, forged or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached, marked "Exhibit A" and made a part hereof, in that said card had stamped thereon the following words and figures:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

which said words and figures were incorrect, inaccurate and not the words and figures used by said Board on Notice of Classification cards:

Contrary to the Selective Service Act of 1940 and the amendments thereto, together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count XIII.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain in his possession, with the intent to utter or publish as true, a falsely altered, forged, or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached, marked "Exhibit A" and made a part hereof, in that said card had stamped thereon the following words and figures:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

which said words and figures were incorrect, inaccurate

and not the words and figures used by said Board on Notice of Classification cards;

Contrary to the Selective Service Act of 1940, and the amendments thereto together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count XIV.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain in his possession, with the intent to utter or publish as true, a falsely altered, forged, or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached, marked "Exhibit A" and made a part hereof, in that said card had stamped thereon the following words and figures:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

which said words and figures were incorrect, inaccurate and not the words and figures used by said Board on Notice of Classification cards;

Contrary to the Selective Service Act of 1940, and the amendments thereto together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count XV.

11 And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain in his possession with the intent to utter or publish as true, a falsely altered, forged, or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached, marked "Exhibit A" and made a part hereof, in that said card had stamped thereon the following words and figures:

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma.

which said words and figures were incorrect, inaccurate and not the words and figures used by said Board on Notice of Classification cards;

Contrary to the Selective Service Act of 1940, and the amendments thereto together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count XVI.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present;

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, George Harris, whose more full, true

and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain in his possession with intent to utter or publish as true, a falsely altered, forged or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached, marked "Exhibit A" and made a part hereof; in that said card had stamped thereon the following words and figures;

12 Local Board No. 7 of Oklahoma County 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

which said words and figures were incorrect, inaccurate and not the words and figures used by said Board on Notice of Classification cards;

Contrary to the Selective Service Act of 1940, and the amendments thereto together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Count XVII.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present:

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain in his possession with intent to utter or publish as true, a falsely altered, forged, or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached marked "Exhibit A" and made a part hereof, in that said card had stamped thereon the following words and figures;

Local Board No. 7 of Oklahoma County, 84, 825 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

which said words and figures were incorrect, inaccurate and

not the words and figures used by said Board on Notice of Classification cards;

Contrary to the Selective Service Act of 1940, and the amendments thereto together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America;

Count XVIII.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present;

13 That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment, at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain in his possession with intent to utter or publish as true, a falsely altered, forged, or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached marked "Exhibit A" and made a part hereof, in that said card had stamped thereon the following words and figures;

Local Board No. 7 of Oklahoma County, 84, 823 Cotton Exchange Bldg., Oklahoma City, Oklahoma,

which said words and figures were incorrect, inaccurate and not the words and figures used by said Board on Notice of Classification cards;

Contrary to the Selective Service Act of 1940, and the amendments thereto together with the rules and regulations issued *purasant* thereto, and the statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America;

Count XIX.

And the Grand Jurors aforesaid, upon their oaths, in the name and by the authority of the United States of America, do further find and present;

That on or about the 20th day of July, 1944, or prior thereto, the exact time being to the Grand Jurors unknown, but all within three years of the return date of this indictment at Oklahoma City, in Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, George Harris, whose more full, true and correct name is to the Grand Jurors unknown, then and there being, did then and there unlawfully, wilfully, knowingly, fraudulently and feloniously have and retain in his possession with intent to utter or publish as true, a falsely altered, forged or counterfeited Notice of Classification card DSS Form 57, copy of which is hereto attached marked "Exhibit A" and made a part hereof, in that said card had stamped thereon the following words and figures;

14 Local Board No. 7 of Oklahoma County, 84, 825
Cotton Exchange Bldg., Oklahoma City, Oklahoma,

which said words and figures were incorrect, inaccurate and not the words and figures used by said Board on Notice of Classification cards;

Contrary to the Selective Service Act of 1940, and the amendments thereto together with the rules and regulations issued pursuant thereto, and the statutes of the United States in such case made and provided, and aginst the peace and dignity of the United States of America.

ROBT. E. SHELTON, Assistant
United States Attorney.

Exhibit A.

Selective Service

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300 (GPO)

(Local Board Date Stamp With Code)

OFFICIAL BUSINESS

(Reverse Side)

Notice of right to appeal

Appeal from classification by local board must be made within 10 days after the mailing of this notice. You may file a written notice of appeal with the local board, or you may go to the office of the local board and sign appeal form on back of Selective Service Questionnaire (Form 40).

Within the same 10-day period you may file a written request for personal appearance before the local board. If this is done, the time in which you may appeal is extended to 10 days from the date of mailing of a new Notice of Classification (Form 57) after such personal appearance.

If an appeal has been taken and you are classified by the board of appeal in either Class 1-A, 1-A-O, or IV-E and one or more members of the board of appeal dissented from such classification, you may file appeal to the President with your local board within 10 days after the mailing of notice of such classification.

For advice, see your Government appeal agent.

The law requires you: (1) To keep in touch with your local board; (2) to notify it of any change of address; (3) to notify it of any fact which might change your classification; (4) to comply with the instructions on the notice of classification part of this form.

GPO 16—31524-4

Cut along this line

NOTICE OF CLASSIFICATION App. not Req.

..... (First name) (Middle name) (Last name)

Order No. ..... has been classified in Class .....

(Until ....., 19.....)
(Insert date for Class II-A and II-B only)

by ☐ Local Board.
☐ Board of Appeal (by vote of ..... to .....).
☐ President.

....., 19..... .....
(Date of mailing) (Member of local board)

The law requires you, subject to new penalty for violation, to have this notice, in addition to your Registration Certificate (Form 2), in your personal possession at all times—to exhibit it upon request to authorized officials—to surrender it, upon entering the armed forces, to your commanding officer.

DSS Form 57. (Rev. 12-10-43.)

Cut along this line to detach card

Endorsed: Filed in District Court on October 17, 1944.

Arraignment.

16 On this 20th day of October, 1944, the defendant appears in person and by Herbert K. Hyde, Esq., his attorney, is duly and legally arraigned upon the indictment herein and enters his plea of not guilty as charged therein. Said defendant is granted leave to stand on his present bond.

Order Granting Leave to File Motion.

17 On this 4th day of December, 1944, the defendant asks and is granted leave to file motion to suppress evidence and petition to return private papers, books, and other property to the defendant. It is ordered by the Court that said motion be taken under advisement and ruling reserved until Tuesday, December 5, 1944. * * * * *

[Defendant's Exhibit 1.]

Notice to Suppress Evidence and Petition to Return Private Papers, Books and Other Property to Defendant.

State of Oklahoma, Oklahoma County, ss.

18 Now Comes George Harris, defendant, and being first duly sworn, on oath states:

That on the 20th day of July, 1944, he was living in and occupying as his home an apartment consisting of living room, bedroom, kitchen and bath, located at 2308 North Ellison Street, in the City of Oklahoma City, Oklahoma;

That on said date he was at home in said premises, and that at about 12:20 p. m., one Thomas G. Melvin, a Special Agent of the Federal Bureau of Investigation, accompanied by four other officers or agents of the Government whose names are unknown to this defendant, came to defendant's said home, knocked at the door, and upon the door being opened by defendant the said Melvin pulled a gun, stated that they were F.B.I. Agents and that they had a warrant for defendant's arrest, and thereupon showed defendant two warrants and told him what he was being arrested for;

that true and correct copies of said warrants, together with true and correct copies of the complaints upon which the same were issued are hereto attached, marked Exhibits A and B, respectively, and made a part hereof;

That thereupon the said Melvin told the other officers to search the house and not to overlook anything, to ransack it and tear it up; designating one to take the living room, one the bathroom, one the bedroom, and the other to look around on the outside; that defendant thereupon asked the said Melvin for a search warrant and asked him what right he had to search his home, and the said Melvin stated that he didn't need a search warrant, and that the warrant he had for the arrest was sufficient cause for him to search his home;

19 That defendant had been handcuffed immediately upon the aforesaid arrest, and was sitting there in the living room, the five officers alternating in staying there with him;:

That said officers immediately started to search through defendant's said home, ransacking it from top to bottom, going through all his personal belongings, looked underneath the carpets, turned the bed upside down, went through all of the defendant's personal papers, opened all the drawers of the bureaus and cabinets, searched in the clothes closet, inside the defendant's shoes and shoe horns; and that said search continued without interruption until about 8:00 o'clock, p. m., on said date, constituting about seven and one-half hours;

That during the course of said search the said Agent Melvin stated to defendant that they were looking for blank checks of the Mudge Oil Company, and several times asked defendant where they were, said he knew they were in the apartment, and that he was going to find them if he had to tear everything down;

That at about 3:00 p. m., the said Melvin wanted to search defendant's automobile which was parked outside and which was locked; that defendant refused to give him such permission, as they did not have a search warrant therefor; that thereupon the said Melvin stated that he would get a search warrant then, and that he left about 3:30 p. m.,

leaving the other officers to continue the search, and that he returned at about 6:10 p. m. and served a search warrant upon defendant purporting to authorize the search of defendant's automobile and of an office in the Perrine Building in Oklahoma City; a true and correct copy of said search warrant, together with a true and correct copy of the affidavit upon which the same was issued, are hereto attached, marked Exhibits C and D, respectively, and made a part hereof;

That during the absence of the said Melvin and at about 6:00 p. m., the other officers produced the envelope from which they took the "eight (8) Notice of Classification cards DSS Form 57 and eleven (11) Registration Certificates, DSS Form 2," described and referred to in the Indictment herein, and which it is stated in said Indictment were "sealed in an envelope on which he had written: 'George Harris Personal Papers' and hidden in the second drawer of a small bureau in a bedroom" of said apartment;

That said search continued, as aforesaid, until about 8:00 p. m., at the end of which time Agent Melvin asked the other officers if they had searched everything, and they stated to him that they didn't miss a thing;

That defendant is unable to state all of the things seized and carried away by said officers, either from his said home, his automobile, or the aforesaid office at 424 Perrine Building; but that, in addition to the aforesaid eight cards and eleven certificates there were also seized and carried away from the home of defendant, among other things, the following: blank stationery of various hotels, blank ruled sheets of paper, several old, broken and obsolete fountain pens, expense bills and receipts, personal mail letters, bill of sale for defendant's automobile, note books, address books, and some mineral deeds, which said mineral deeds have since been returned to defendant; that they found nothing whatsoever which in any way pertained to the Mudge Oil Company; that the said articles so seized were wrapped in a package and carried away from said home by said officers in a package approximately one foot by one foot by two feet in size;

That from his automobile defendant has missed and therefore alleges were carried away by said officers the following: A pair of sunglasses, in a leather case, of the value of about $30.00; paid expense bills for repairs on said automobile; notebooks, and other personal belongings which he is unable to itemize;

That from the aforesaid office there was seized an unopened and sealed letter addressed to this defendant and which had been received at said office through the United States mails; that said letter was later opened in the
21 office of the United States Attorney, a copy thereof made and retained by said Attorney, and that the original letter was thereupon returned to this defendant;

Defendant further says that the United States District Attorney, marshal, the clerk of this Court and the aforesaid F.B.I. agents took the above-described property so seized into their possession, and have failed and refused to return the same, or any portion thereof except the said mineral deeds and original letter, to this defendant;

And this defendant alleges:

1. That the sole purpose of said searches and seizures was exploratory and merely to attempt to discover and seize evidence to convict this defendant of crime;

2. That the said search warrant for said automobile and office was and is invalid, because issued upon an affidavit based solely upon information and belief;

3. That the things to be seized and the place where they were located were not particularly described in the affidavit for said search warrant or in said search warrant itself;

4. That none of the articles and property seized by said officers related or pertained, directly or indirectly, to the crime for which this defendant was then purported to be arrested;

5. That said officers had no search warrant for the home of this defendant, and had no authority for searching said home or for seizing any of the aforesaid articles or any others;

6. That said searches and seizures were and are in viola-

tion of the Fourth and Fifth Amendments to the Constitution of the United States;

7. That said property is being unlawfully and improperly held by the said district attorney, marshal, clerk and F.B.I. Agents in violation of defendant's rights under the aforesaid Amendments to the Constitution of the United States;

8. That this defendant is informed and believes that the said district attorney, marshal, clerk and F.B.I. Agents *intends* to attempt to introduce in evidence against this defendant on the trial of this cause the aforesaid articles and property so unlawfully and wrongfully seized by said officers, and particularly the aforesaid eight cards and eleven certificates so seized from among the private papers of this defendant, and that unless said evidence be suppressed that they will do so, in violation of this defendant's rights under the aforesaid Amendments to the Constitution of the United States.

22

Wherefore, defendant prays that said district attorney, marshal, clerk and F.B.I. Agents be directed and ordered to return all of the articles and property seized as aforesaid to this defendant, and that the same be suppressed as evidence in the trial of this cause.

GEORGE HARRIS, Defendant.

Subscribed and sworn to before me this 1st day of December, 1944. Lee Williams, Notary Public. My commission expires: Feb. 12, 1945. (Seal).

HERBERT K. HYDE, 406 Perrine Bldg.,
Oklahoma City, Attorney for Defendant.

Exhibit A.

(United States Commissioner's Blanks No. 1)

Affidavit, Complaint, or Information for Warrant.

United States of America, Western District of Oklahoma, ss.

23 Before me, Paul E. Showalter, a United States Commissioner for the Western District of Oklahoma

personally appeared this day G. H. *Wewin*, Spec. Agt. F.B.I., who being first duly sworn, deposes and says that on or about the 7 day of March A. D. 1944 at Blackwell, Oklahoma, in said District, George Harris, alias Ralph Howard, alias Ralph B. Howard, and C. R. Moffett in violation of Section 338, Title 18 of the U. S. C. A. did unlawfully wilfully, knowingly and feloniously place and cause to be placed in the Post Office at Blackwell, Oklahoma, to be sent and delivered by the Post Office establishment of the United States, according to the address thereon, a certain letter addressed to Guaranty Trust Company of New York, which said letter was in furtherance of, and for the purpose of, executing a scheme to defraud and to obtain money and property by means of false pretenses and promises theretofore formed by the said defendants, George Harris and C. R. Moffett, which said scheme was in connection with the negotiation and cashing of a certain false, forged and fictitious check for the sum of $25,000.00, drawn on the Mudge Oil Company and signed "The Mudge Oil Co., E. W. Mudge, Jr., V.P., S. H. Newbery, Treas.," said check on the reverse side thereof containing the endorsement, "American Oil & Gas Co., Blackwell, Oklahoma, by C. R. Moffett, Owner," and which said check was thereafter cashed at the First National Bank, Blackwell, Oklahoma, the same also bearing endorsements guaranteed, March 7, 1944, "First National Bank, Blackwell, Oklahoma, 86-153, and being further endorsed "For Collection and Remittance, Endorsements Guaranteed Guaranty Trust Company of New York 193368", the said George Harris and C. R. Moffett, and each of them, at all times knowing said check to be falsely made, forged and counterfeited, and the said check being deposited for collection and payment in *pursuant* of said scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America;

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Deponent further says that he has reason to believe and

does believe that G. H. Erwin, Enid, Oklahoma, W. W. Chamber, Blackwell, Okla. & Earl T. Bowman, Blackwell, Oklahoma

are material witnesses to the subject matter of the complaint.

G. H. ERWIN, Spec. Agt. F.B.I.

Sworn to before me, and subscribed in my presence, this 15 day of July A. D. 1944.

(Seal)

PAUL F. SHOWALTER, United States Commissioner as aforesaid.

Exhibit B.

(United States Commissioner's Blanks. No. 103)

Warrant to Apprehend.

The President of the United States of America,

To the Marshal of the United States for the Western District of Oklahoma and to His Deputies, or Any or Either of Them & to Directors, Assistant Directors, Special Agent or Inspectors of the F. B. I.

24 Whereas, G. H. Erwin, Spec. Agt. F.B.I., has made complaint in writing under oath before me, the undersigned, a United States Commissioner for the Western District of Oklahoma charging that George Harris, alias Ralph Howard, alias Ralph B. Howard and C. R. Moffett, late of .....County, in the State of ..... did, on or about the 7 day of March, A. D. 1944, at Blackwell, Oklahoma, in said District, in violation of Section 338 Title 18 of the U.S.C.A., did unlawfully

wilfully, knowingly, and feloniously place and cause to be placed in the Post Office at Blackwell, Oklahoma, to be sent and delivered by the Post Office establishment of the United States, according to the address thereon, a certain letter addressed to Guaranty Trust Company of New York, which

said letter was in furtherance of, and for the purpose of, executing a scheme to defraud and to obtain money and property by means of false pretenses and promises theretofore formed by the said defendants, *George* Harris and C. R. Moffett, which said scheme was in connection with the negotiation and cashing of a certain false, forged and fictitious check for the sum of $25,000.00, drawn on the Mudge Oil Company and signed "The Mudge Oil Co., E. W. Mudge, Jr., V.P., S. H. Newbery, Treas.," said check on the reverse side thereof containing the endorsement, "American Oil & Gas Co., Blackwell, Oklahoma, by C. R. Moffett, Owner", and which said check was thereafter cashed at the First National Bank, Blackwell, Oklahoma, the same also bearing endorsements guaranteed, March 7, 1944, First National Bank, Blackwell, Oklahoma, 86-153, and being further endorsed "For collection and Remittance, Endorsements Guaranteed Guaranty Trust Company, of New York 193368", the said George Harris and C. R. Moffett, and each of them, at all times knowing said check to be falsely made, forged and counterfeited, and the said check being deposited for collection and payment in *pursuant* of said scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Now, Therefore, You are Hereby Commanded, in the name of the President of the United States of America, to apprehend the said George Harris, alias Ralph Howard, alias Ralph B. Howard, and C. R. Moffett *whereever* found in your District, and bring their bodies forthwith before me or any other Commissioner having jurisdiction of said matter, to answer the said complaint, that he may then and there be dealt with according to law for said offense.

Given under my hand and seal this 15 day of July, A. D. 1944.

PAUL F. SHOWALTER, United States Commissioner as aforesaid.

(Seal)

Exhibit C.

(United States Commissioner's Blanks. No. 1)

Affidavit, Complaint, or Information for Warrant.

United States of America, Western District of Oklahoma, ss.

Before me, Paul F. Showalter, a United States Commissioner for the Western District of Oklahoma personally appeared this day G. H. Erwin, Spec. Agt. F. B. I. who being first duly sworn, deposes and says that on or about the 7 day of March A. D. 1944 at Blackwell, Oklahoma, in said District, George Harris, alias Ralph B. Howard alias Ralph Howard, and C. R. Moffett, in violation of Section 415 Title 18 of the U. S. C. A., did unlawfully knowingly, wilfully and feloniously, and with intent to defraud the First National Bank, Blackwell, Oklahoma, Mellon National Bank, Pittsburgh, Pennsylvania, The Mudge Oil Company, Pittsburgh, Pennsylvania, Guaranty Trust Company of New York, transport, or cause to be transported in interstate commerce from Blackwell, Oklahoma, to Pittsburgh, Pennsylvania, a certain falsely made, forged and counterfeited security or check drawn on *Mellin* National Bank, Pittsburgh, Pennsylvania, dated March 4, 1944, made payable to American Oil and Gas Co., E. W. Mudge, Jr., V.P., S. H. Newbery, Treas., said check on the reverse side thereof containing the endorsements: American Oil & Gas Co., Blackwell, Oklahoma, by C. R. Moffett, Owner, and thereafter being cashed at the First National Bank, Blackwell, Oklahoma, pay to the order of any bank or banker, prior endorsements guaranteed, March 7, 1944, First National Bank, Blackwell, Okla., 86-153, and being further endorsed for Collection and Remittance, Endorsements Guaranteed Guaranty Trust Company of New York 193368, the said *George* Harris, with aliases, and C. R. Moffett, and each of them, at all times knowing said check to be falsely made, forged and counterfeited;

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Deponent further says that he has reason to believe and does believe that

are material witnesses to the subject matter of the complaint.

G. H. ERWIN, Spec. Agent, F.B.I.

Sworn to before me, and subscribed in my presence, this 15 day of July A. C. 1944.

(Seal) PAUL F. SHOWALTER, United States Commissioner as aforesaid.

(United States Commissioner's Blanks. No. 103)

Warrant to Apprehend.

The President of the United States of America,

To the Marshal of the United States for the Western District of Oklahoma and to His Deputies, or Any or Either of Them; & to Director, Assistant Director, Special Agents or Inspectors of the F. B. I.

26 Whereas, G. H. Erwin, Spec. Agt. F.B.I. has made complaint in writing under oath before me, the undersigned, a United States Commissioner for the Western District of Oklahoma charging that George Harris, alias Ralph R. Howard, alias Ralph Howard, and C. R. Moffett, late of..... County, the State of ....., did, on or about the 7th day of March, A. D. 1944, at Blackwell, Oklahoma, in said District, in violation of Section 415, Title 18 of the U. S. C. A. did unlawfully, knowingly, wilfully and feloniously, and with intent to defraud the First National Bank, Blackwell, Oklahoma, Mellon National Bank, Pittsburgh, Pennsylvania, The Mudge Oil Company, Pittsburgh, Pennsylvania, Guaranty Trust Company of New York, transport, or cause to be transported in interstate commerce from Blackwell, Oklahoma, to Pittsburgh, Pennsylvania, a certain falsely made, forged and counterfeited security or check drawn on Mellon National Bank, Pittsburgh, Pennsylvania, dated March 4, 1944, made payable to American Oil and Gas Co., Blackwell, Oklahoma, in the sum of $25,000.00, drawn on The Mudge Oil Co., E. W. Mudge, Jr., V.P., S. H. Newbery, Treas., said check on the reverse side there-

of containing the endorsements: American Oil & Gas Co., Blackwell, Oklahoma, by C. R. Moffett, Owner, and thereafter being cashed at the First National Bank, Blackwell, Oklahoma, pay to the order of any bank or banker, prior endorsements guaranteed March 7, 1944, First National Bank, Blackwell, Okla., 86-153, and being further endorsed, for Collection and Remittance, Endorsements Guaranteed Guaranty Trust Company of New York 193368, the said George Harris, with aliases and C. R. Moffett, and each of them, at all times knowing said check to be falsely made, forged and counterfeited;

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Now, Therefore, You are Hereby Commanded, in the name of the President of the United States of America, to apprehend the said George Harris, alias Ralph B. Howard, alias Ralph Howard and C. R. Moffett, wherever found in your District and bring their bodies forthwith before me or any other Commissioner having jurisdiction of said matter, to answer the said complaint, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 15 day of July A. D. 1944.

PAUL F. SHOWALTER, United States Commissioner as aforesaid.

(Seal)

Application for Search Warrant.

27 Before The Honorable Paul F. Showalter, United States Commissioner for the Western District of Oklahoma

In the Matter of the Application for a Search Warrant for George Harris, alias Ralph B. Howard, alias Ralph Howard, and the following described property: 1942 Model Chrysler Town Sedan, Engine No. C363912, bearing 1944 Kansas license tag No. 2-41352, parked at the curb in front of his residence located at 3308 North Ellison Street, Oklahoma City, Oklahoma; and his private offices and effects located at 424 Perrine Building, Oklahoma City, Oklahoma.

Thomas G. Melvin, being first duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, at Oklahoma City, Oklahoma, and the United States of America; that he has good cause to believe, and does believe that George Harris, alias Ralph B. Howard, alias Ralph Howard, has in his possession on or in his automobile, described as follows, to-wit: 1942 Model Chrysler Town Sedan, Engine No. C363912, bearing 1944 Kansas license tag No. 2-41352, which is parked at the curb in front of his residence located at 2308 North Ellison Street, Oklahoma City, Oklahoma, or at or in his private offices and effects located at 424 Perrine Building, Oklahoma City, Oklahoma, or John Doe's office located in said room, certain monies unlawfully obtained, checks of The Mudge Oil Company and other forms of checks and other paraphernalia and instrumentalities used in the perpetration of what is commonly known as "confidence game," or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books which he is holding in his possession unlawfully and which said ration books have been issued in violation of orders issued pursuant to the authority of, and by, the Office of Price Administration, said mileage ration books being used in connection with the driving and operation of the said above-described automobile and said books being issued in addition to those which have been legally issued to the said George Harris, alias Ralph B. Howard, alias Ralph Howard.

28 Wherefore, affiant prays that a Search warrant may issue directed to Thomas G. Melvin, Special Agent of the Federal Bureau of Investigation, with offices in Oklahoma City, Oklahoma, in the Western District of Oklahoma, and such other Special Agents of the Federal Bureau of Investigation as he may authorize or deputize to assist him, to search said automobile hereinabove described belonging to George Harris, alias Ralph B. Howard, alias Ralph Howard, located as aboye set out, and to search the private offices and effects of the said George Harris, alias Ralph B. Howard, alias Ralph Howard, located at 424 Perrine Building Oklahoma City, Oklahoma, and to then and there seize and take into their possession and custody any and all monies in any form, checks of The Mudge Oil Company and other forms of checks and other paraphernalia and instru-

mentalities used in the perpetration of what is commonly known as the "confidence game," or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books unlawfully possessed by the said George Harris, alias Ralph B. Howard, alias Ralph Howard, to the end that the same may be dealt with according to law.

THOMAS G. MELVIN, Special Agent, Federal Bureau of Investigation, Affiant.

Subscribed and sworn to before me this 20th day of July, 1944.

PAUL F. SHOWALTER,
United States Commissioner.

Exhibit D.

Search Warrant.

United States of America, Western District of Oklahoma, ss.

The President of the United States of America.

To: Thomas G. Melvin, Special Agent, Federal Bureau of Investigation, Oklahoma City, Oklahoma, in the Western District of Oklahoma, and to such other Special Agents of the Federal Bureau of Investigation as he may authorize or deputize to assist him, or any of them, Greeting:

29 Whereas application on oath and in writing verified by Affidavit has this day been made before me, Paul F. Showalter, United States Commissioner for the Western District of Oklahoma by Thomas G. Melvin, Special Agent of the Federal Bureau of Investigation, Oklahoma City, Oklahoma, in the Western District of Oklahoma, alleging that George Harris, alias Ralph B. Howard, alias Ralph Howard, who owns a 1942 Model Chrysler Town Sedan automobile Engine No. C363912, bearing 1944 Kansas license tag No. 2-41352, which is parked at the curb in front of his residence located at 2308 North Ellison Street, Oklahoma City, Oklahoma, and who maintains a private office and effects located at 424 Perrine Building, Oklahoma City, Oklahoma,

or John Doe's office located in said room, has in his possession on or in said automobile, or at or in said private offices and effects, certain monies unlawfully obtained, checks of The Mudge Oil Company and other forms of checks and other paraphernalia and other instrumentalities used in the perpetration of what is commonly known as the "confidence game", or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books which he is holding in his possession unlawfully and which said ration books have been issued in violation of orders issued pursuant to the authority of, and by, the Office of Price Administration, said mileage ration books being used in connection with the driving and operation of the said above-described automobile and said books being issued in addition to those which have been legally issued to the said George Harris, alias Ralph B. Howard, alias Ralph Howard, and that the said George Harris, alias Ralph B. Howard, alias Ralph Howard, is now retaining and using said property in violation of the statutes of the United States of America.

30 You are, therefore, hereby commanded, in the name of the President of the United States, to search the person of George Harris, alias Ralph B. Howard, alias Ralph Howard, and to enter upon and search the private offices maintained by him located at 424 Perrine Building, Oklahoma City, Oklahoma, and the automobile owned by him described as a 1942 Model Chrysler Town Sedan, Engine No. C262912, bearing 1944 Kansas license tag No. 2-41352, which is parked at the curb in front of his residence located at 2308 North Ellison Street, Oklahoma City, Oklahoma, in the day time, and in the event you find any of those things described in the application for search warrant, to-wit: certain monies unlawfully obtained, checks of The Mudge Oil Company and other forms of checks and other paraphernalia and the instrumentalities used in the perpetration of what is commonly known as the "confidence game," or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books which he is holding in his possession unlawfully and which said ration books

have been issued in violation of orders issued pursuant to the authority of, and by, the Office of Price Administration, said mileage ration books being used in connection with the driving and operation of the said above-described automobile and said books being issued in addition to those which have been legally issued to the said George Harris, alias Ralph B. Howard, alias Ralph Howard, in the possession of said party, or in the said automobile above described, or in the private offices and effects above described, being in his possession and being used in violation of the statutes of the United States or issued to him in violation of the rules and regulations made by the Office of Price Administration pursuant to law; you are authorized and commanded to seize and secure the same and to make a return of your action on this Search Warrant within ten days from the date hereof and to do and report concerning the same as the law directs and requires.

You are likewise commanded to give a copy of this warrant to the person searched, together with a receipt specifying in detail any property seized or taken hereunder to the person from whom it is taken or in whose possession it is found, and in the absence of any such person, to leave copy of this warrant with the receipt aforesaid at the place where such warrant is executed and such property taken, if any.

31 Given under my hand and the seal of the Court, this 20th day of July, 1944.

PAUL F. SHOWALTER,
(Seal) United States Commissioner.

(Clerk's Note: This pleading and the exhibits attached thereto were introduced as defendant's Exhibit #1 but will not be included as an exhibit among those transmitted to the Circuit Court of Appeals.)

Endorsed: Filed in District Court on December 4, 1944.

Order Continuing Date of Trial.

32 On this 6th day of December, 1944, parties appear by their respective counsel and waive trial by jury in open court. Thereupon, it is ordered by the Court that this cause be continued for trial before the Court to December 8, 1944, at 9:30 A. M. * * * * *

Motion to Quash Indictment.

33 Comes now the defendant, George Harris, and moves the Court to quash the indictment returned herein, and each and every separate count thereof, upon all the files in this case in this Court, in the files of the United States Attorney, for the reason and upon the ground that said indictment and each and every separate count thereof is based solely, and the only evidence before the grand jury was evidence had and obtained by an illegal search and seizure in violation of the constitutional rights of this defendant under the Fourth and Fifth Amendments to the Constitution of the United States, for the same reasons as stated in the notion to suppress evidence and for return of articles so seized heretofore filed herein.

HERBERT K. HYDE,
Attorney for Defendant.

Endorsed: Filed in District Court on December 8, 1944.

Demurrer.

34 Comes now the defendant, George Harris, and demurs to the Indictment returned and filed herein, for the reason that said Indictment does not state facts sufficient to charge any offense against the laws of the United States.

2.

Defendant further demurs separately to each and every separate of the nineteen counts in said Indictment, for the reason that none of said counts, separately, state sufficient

facts to charge any offense against the laws of the United States.

HERBERT K. HYDE,
406 Perrine Bldg., Oklahoma City, Attorney for Defendant.

Endorsed: Filed in District Court on December 8, 1944.

Waiver of Jury Trial.

35 I, the undersigned defendant in the above-entitled case, do hereby state and acknowledge that the indictment has been fully explained to me, and I am fully advised of the charge against me contained therein. I further state that the court has duly explained to me my constitutional rights, and to have a trial by jury.

I hereby waive the right to trial by a jury, and enter a plea of not guilty to each count set forth in said indictment.

I have carefully read the foregoing before affixing my signature thereto at Oklahoma City, Oklahoma, this 8th day of December A. D. 1944.

GEORGE HARRIS,
Defendant.

We, the undersigned, were present at the time the court apprised the defendant of his constitutional rights, and witnessed the signature of the defendant.

THEODORE M. FILSON
B. R. SIMPSON

Endorsed: Filed in District Court on December 8, 1944.

[Rulings on Various Motions etc.]

36 On this 8th day of December, 1944, the plaintiff appears by Charles E. Dierker, Esq., United States Attorney, and Robert E. Shelton, Esq., Assistant United States Attorney, and the defendant appears in person and by Herbert K. Hyde, Esq., his attorney. Thereupon, the motion of the defendant to suppress evidence herein comes on for hearing, arguments of counsel are heard, and the

Court being fully advised in the premises overrules said motion to suppress evidence, and exceptions are allowed the defendant. Thereupon, the defendant asks and is granted leave to file supplemental motion to suppress evidence, motion to quash, and demurrer to the indictment, which motions and demurrer are considered by the Court, overruled, and exceptions are allowed the defendant to the rule of the Court thereon. Thereupon, said cause is called for trial. The defendant waives trial by jury in writing, and the case is tried to the Court without the intervention of a jury. Counsel for plaintiff states its case to the Court, and at this time counts eleven and thirteen are dismissed by the Court on motion of the United States Attorney. Thereupon, the plaintiff presents its evidence and proof and rests. The defendant waives the presentation of evidence and proof and renews his motion to dismiss and demurrer to the indictment, which are considered by the Court, each overruled and exceptions are allowed the defendant. Thereupon, this case is submitted to the Court for determination upon the evidence presented to the Court. * * * * *

[Order Re-Opening Case etc.]

37 On this 18th day of December, 1944, the plaintiff appears by Charles E. Dierker, Esq., United States Attorney, and Robert E. Shelton, Esq., Assistant United States Attorney, and the defendant appears in person and by Herbert K. Hyde, Esq., his attorney. Thereupon, by direction of the Court this case is re-opened for the further presentation of evidence, and the plaintiff presents further evidence and proof and Virginia McCollum, Pauline Howard and Edith B. King are sworn and testify in behalf of plaintiff, and the plaintiff rests. The defendant presents no evidence and rests, and the taking of evidence is closed. Thereupon, the defendant renews his motion to suppress evidence and demurrer to the indictment, which said motions and cause are re-submitted to the Court for determination, and said cause is assigned for decision on January 4, 1945, at 9:30 A. M. The defendant is granted leave to stand on his present bond. ***

[Finding of Guilt and Judgment and Commitment.]

38 On this 4th day of January, 1945, the plaintiff appears by Robert E. Shelton, Esq., Assistant United States Attorney, and the defendant appears in person and by Herbert K. Hyde, Esq., his attorney. Thereupon, this cause comes on for hearing on motion of the defendant to suppress evidence, motion to quash indictment, and demurrer to indictment, which are considered by the Court, each overruled, and exceptions allowed the defendant. Thereupon the Court finds the defendant not guilty on the first count of the indictment, and counts eleven and thirteen having heretofore been dismissed by the Court, the Court finds the defendant guilty on each of counts two, three, four, five, six, seven, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen.

Judgment and Commitment.

On this 4th day of January, 1945, came the United States Attorney, and the defendant, George Harris, appearing in proper person, and by Herbert K. Hyde, Esq., and

The defendant having been convicted on finding of guilt by the Court of the offenses charged in the indictment in the above-entitled cause, to wit: receiving and concealing Government property and violation of Selective Service Act of 1940, Regulations 623.21-2, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative for the period of five (5) years on each of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth counts, or until said defendant is otherwise discharged as provided by law.

It is Further Ordered that sentences of confinement herein shall run concurrently.

It is further ordered that appeal bond of the defendant is fixed in the sum of Ten Thousand Dollars ($10,000.00) and the defendant is granted until 12:00 o'clock Noon, January 5, 1945, to file said appeal bond, and the defendant is
39 permitted to stand on his present bond, until that time.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

STEPHEN S. CHANDLER, JR.
United States District Judge.

Notice of Appeal.

41 Name and Address of Appellant: George Harris, 2308 North Ellison, Oklahoma City, Oklahoma.

Name and Address of Appellant's Attorneys: Herbert K. Hyde, and Lee Williams, 406 Perrine Building, Oklahoma City, Oklahoma.

Offense: Violation: Section 100, Title 18, USCA; Section 101, Title 18, USCA; Section 311, Title 50, App. USCA; Selective Service Act of 1940 Regulations 623.61-2.

Date of Judgment: January 4, 1945.

Brief Description of Judgment and Sentence: Guilty on 16 counts; Five years' imprisonment on each count, concurrent.

Status: Defendant released on $10,000 appeal bond.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit, from the judgment and sentence above mentioned, on the grounds set forth below.

GEORGE HARRIS,
Appellant.

Dated: January 5, 1945.

1. That the Court erred in overruling the motion of the defendant to suppress evidence.

2. That the Court erred in overruling the petition of the defendant for the return of private papers and other property to the defendant.

3. That the Court erred in overruling the motion of the defendant to quash the indictment.

4. That the Court erred in overruling the demurrer of the defendant to the indictment, and to each and every separate count thereof.

5. The Court erred in the admission of evidence over the objection of the defendant.

6. The Court erred in decisions of law arising during the course of the trial.

42 7. That the judgment is contrary to law.

8. That the judgment is contrary to the evidence.

9. That the judgment is not supported by sufficient evidence.

10. That the evidence upon which the indictment, and each and every count thereof, was based, and which was introduced in evidence and upon which the judgment of conviction on each and every count was based, was obtained by an unreasonable and unlawful search and seizure in violation of the rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States.

HERBERT K. HYDE,
LEE WILLIAMS,
Attorneys for Defendant.

Receipt of the within and foregoing Notice of Appeal is hereby acknowledged this 5" day of January, 1945, in duplicate.

THEODORE M. FILSON,
Clerk, United States District Court for the Western District of Oklahoma.

Service of a copy of the within and foregoing Notice of Appeal is hereby acknowledged this 5 day of January, 1945.

CHARLES E. DIERKER,
United States Attorney,
Western District of Oklahoma.

Endorsed: Filed in District Court on January 5, 1945.

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45 [An approved appeal bond in the sum of $10,000.00 was filed January 5, 1945.]

Clerk's Statement of Docket Entries

To Be Forwarded Under Rule IV
of U. S. Supreme Court.

1. Indictment for violation Section 100, Title 18, U.S.C.A., Section 101; Title 18, U.S.C.A., Section 311, Title 50, App. U.S.C.A., Selective Service Act of 1940 Regulations 623.61-2, Returned and filed ..... October 17, 1944.

2. Arraignment with plea of not guilty ..... (Judge Chandler) ..... October 20, 1944.

3. Motion of defendant to suppress evidence, and petition to return private papers, books and other property, filed ..... December 4, 1944.

4. Motion to quash indictment and demurrer to indictment filed ..... December 8, 1944.

5. Waiver of trial by jury filed ..... December 8, 1944.

6. Hearing on motion of defendant to suppress evidence overruled, exception allowed. Defendant leave file supplemental motion to suppress evidence and motion to quash indictment overruled, exception allowed. Defendant leave to file demurrer to indictment overruled, exception allowed. Counts eleven and thirteen dismissed on motion U. S. Attorney. Cause tried to Court and evidence of plaintiff heard. Defendant waives presentation of evidence and proof and renews motions to dismiss and demurrer to indictment. Overruled, exceptions allowed. Cause submitted to the Court for determination. (Judge Chandler) ..... December 8, 1944.

7. Case re-opened for further presentation of evidence by direction of Court and plaintiff presents further evidence. Defendant presents no evidence and rests. Defendant renews motion to suppress evidence and demurrer to indictment and said motion and cause resubmitted to the Court for determination. Case assigned for decision on January 4, 1945, 9:30 A. M.....
.....(Judge Chandler).....December 18, 1944.

8. Motion to suppress evidence, motion to quash indictment and demurrer to indictment each overruled and exceptions allowed the defendant. The Court finds the defendant not guilty on first count of the indictment and finds the defendant guilty on each of counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17, 18 and 19. Judgment and sentence imposed five years custody Attorney General from date of delivery on each of sixteen counts above stated, sentences of confinement to run concurrently. Defendant gives notice of intention to appeal and Court fixes appeal bond sum $10,000.00. Defendant granted until 12:00 noon January 5, 1945, to file appeal bond.....(Judge Chandler).....January 4, 1945.

9. Notice of appeal filed by defendant .....January 5, 1945.

10. Appeal bond in sum of $10,000.00 approved and filed.....
.....January 5, 1945.

Dated at Oklahoma City, Oklahoma, January 10, 1945.

Attest:

THEODORE M. FILSON,
(Seal) Clerk of said Court.

Order Granting Appellant Further Time Within Which to Prepare and Procure Settlement of Bill of Exceptions and File Assignments of Error Under Rule 9, and for Transmission of Original Exhibits to Court of Appeals.

40 At Oklahoma City, Oklahoma, in this 26th day of January, 1945, upon hearing on directions pertinent to appeal in accordance with order heretofore entered herein, and on oral application of the defendant and for good cause shown, it is

Ordered that the defendant (appellant) be and he is hereby granted up to and including April 4, 1945, within which to prepare and procure settlement of bill of exceptions on appeal and file the same with the Clerk of this Court under Rule 9 of the Rules of Criminal Procedure, and within which to prepare and file with the Clerk of this Court his assignments of error; and it is further

Ordered that upon the filing of said bill of exceptions and assignments of error within said time, the Clerk of this Court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, including the Clerk's record of proceedings under Rule 8, with his certificate, together with all the original exhibits introduced in evidence upon the trial of this cause in this Court and upon the hearing on the defendant's motion to suppress evidence, to the Clerk of the Circuit Court of Appeals for the Tenth Circuit, and the papers and exhibits so forwarded shall constitute the record on appeal herein.

STEPHEN S. CHANDLER, JR.
United States District Judge.

O.K.

ROBT. E. SHELTON,
Assistant United States Attorney.

HERBERT K. HYDE,
Attorney for Defendant.

Endorsed: Filed in District Court on January 26, 1945.

Request for Record on Appeal.

178 The Clerk of this Court is hereby requested to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States for the Tenth Circuit, by including therein the following:

1. The Indictment.

2. Clerk's Minute, October 20, 1944, re arraignment and plea.

3. Clerk's Minute, December 4, 1944, re leave to file motion to suppress evidence and petition to return papers.

3-a. Appellant's motion to suppress evidence and return papers.

4. Clerk's Minute, December 6, 1944, re waiver of trial by jury.

5. Motion of defendant to quash indictment.

6. Demurrer of defendant to indictment.

7. Waiver of defendant to trial by jury.

8. Clerk's Minute, December 8, 1944, re proceedings on motions and trial.

9. Clerk's Minute, December 18, 1944, re further trial proceedings.

10. Clerk's Minute, January 4, 1945, re motions and demurrer, and decision of Court.

11. Judgment and sentence.

12. Order granting appellant further time within which to prepare and procure settlement of bill of exceptions, and for transmission of original exhibits.

13. Bill of exceptions.

14. Assignments of error.

15. This praecipe.

179 The Clerk of this Court is also requested to forward, under his certificate, all of the original exhibits introduced in evidence upon the trial of this cause and upon the hearing on the defendant's motion to suppress evidence, to the Clerk of the Circuit Court of Appeals of the United States for the Tenth Circuit, for the use of said Court, as required by the Order entered by this Court on January 26, 1945.

HERBERT K. HYDE,
406 Perrine Building,
Oklahoma City, Oklahoma,
Attorney for Appellant.

Service of a copy of the above praecipe acknowledged this 9th day of March, 1945.

CHARLES E. DIERKER,
United States District Attorney,
Western District of Oklahoma,
By ROBT. E. SHELTON,
Assistant United States District Attorney.

Endorsed: Filed in District Court on March 9, 1945.

Assignment of Errors.

48 Comes now the defendant, George Harris, appellant herein, and assigns the following errors made by the trial court as the errors upon which the said appellant will rely in his prosecution of the appeal in the above entitled cause:

1. That the Court erred in overruling the defendant's motion to suppress evidence.

2. That the Court erred in overruling the defendant's petition to return private papers, books and other property.

3. That the Court erred in overruling the defendant's motion to quash the indictment.

4. That the Court erred in overruling the defendant's demurrer to the indictment, and to each and every separate count thereof.

5. That the judgment and sentence are contrary to law.

6. That the judgment and sentence are contrary to the evidence.

7. That the judgment and sentence are not supported by sufficient evidence.

8. That the evidence upon which the indictment, and each and every count thereof, was based, and upon which the judgment of conviction on each and every count was based, was obtained by an unreasonable and unlawful search and seizure in violation of the rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States.

9. That the Court erred in admitting in evidence over the objection of the defendant certain tertimony and evidence obtained by virtue of an unreasonable and unlawful search of defendant's home made without any search warrant and without any probable cause, in violation of
49 the rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States.

10. That the Court erred in refusing competent, relevant and material testimony offered by and on behalf of the defendant, particularly in refusing to permit the witness Thomas G. Melvin, special agent of the Federal Bureau of Investigation, to testify whether or not the defendant was indicted upon the charge which said witness arrested defendant at the time he searched defendant's home.

11. That the Court erred in permitting the witness James C. Ware to make a demonstration in open Court by opening a door of the Court room by the use of certain pieces of celluloid which were erroneously introduced in evidence over the objection of the defendant.

12. That the Court erred in overruling the demurrer of the defendant to all of the evidence offered by the Government.

13. That the Court erred in overruling the motion of the defendant to strike all of the testimony with reference to the articles which were offered in evidence, for the reason that the same were obtained by the Government agents in violation of law by means of an unreasonable and unlawful search and seizure made of defendant's home without any search warrant and without any probable cause, in violation of the rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States.

14. That the Court erred in permitting the Government to introduce the testimony of the witnesses Pauline Howard and Edith Brown King by which they attempted to identify the defendant as a man they had seen in the office of the Mudge Oil Company in Dallas, Texas, in March, 1944.

And, by reason of said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of the District Court for the Western District of Oklahoma, aforesaid, on the indictment filed herein, be reviewed, reversed and annulled, and that such fur-
50 ther orders be made herein as are mete and proper in the premises, and that the defendant be discharged from the judgment against him and restored to all rights of which he has been deprived by reason of said judgment.

HERBERT K. HYDE,
LEE WILLIAMS,
Attorneys for Defendant.

Receipt of a copy of the foregoing Assignment of Errors is hereby acknowledged this 28 day of March, 1945.

CHARLES E. DIERKER,
United States District Attorney,
By ROBT. E. SHELTON,
Assistant U. S. District Attorney.

Endorsed: Filed in District Court on March 28, 1945.

Bill of Exceptions.

51 Now on this 8th day of December, 1944, the above cause comes on for trial before Hon. Stephen Chandler, Judge, at Oklahoma City, Oklahoma, a jury having been waived by the defendant, in writing.

Appearances: Mr. Charles E. Dierker, U. S. District Attorney, and Mr. Robert E. Shelton, Assistant U. S. District Attorney, for the Plaintiff. Mr. Herbert K. Hyde, for the Defendant.

The Defendant is present in person.

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52 Mr. Hyde: Does Your Honor wish the record to show you overruled my motion to suppress?

The Court: The motion to suppress and the motion to quash will both be overruled.

Mr. Hyde: Exception. And the demurrer. Now at this

time will you let the record show these motions I filed, the motion to quash and the motion to suppress, that our plea of not guilty was withdrawn for the purpose of filing and presenting those matters?

The Court: Yes.

Mr. Hyde: And the defendant now enters his plea of not guilty.

The Court: You may proceed.

Mr. Shelton: Let the record show we objected to him withdrawing his plea and presenting these matters.

The Court: That is satisfactory.

Mr. Hyde: In that connection, I want the record to show I have furnished the United States Attorney with my motions, and did so several days ago, as Your Honor knows, and we have had two or three minor skirmishes in court on it, waiting for an opportunity to present the matter.

The Court: That is true.

Mr. Shelton: May the record also show that I was furnished with a copy of his brief on the day the case
53 was set for trial the first time.

Mr. Hyde: No, the brief was furnished on Monday and the case was set for Tuesday.

The Court: The brief was furnished to the Court the day before. I believe that was Monday, but I don't believe at that time you furnished the United States Attorney a copy.

Mr. Shelton: He handed me one in open court on Tuesday.

Mr. Hyde: I did spend Monday afternoon in your office.

Mr. Shelton: No, it was Tuesday.

Mr. Hyde: The clerk's record will show when I filed this motion. It was before the case was set down.

The Court: As I recall, this case was set the following day. I believe this case was set on Wednesday, wasn't it?

Mr. Hyde: I thought it was Tuesday. Maybe it was Wednesday.

The Court: It was filed while the jury in the case we were trying was just getting ready to retire. I believe it was Monday.

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54 GERRY BOWER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. Shelton) State your name.
A. Gerry Bower.
Q. Do you hold any official position with the draft board of Oklahoma City?
A. I have been clerk of draft board No. 7.
Q. How long have you held that position?
A. Since June, 1942.
Q. I hand you what has been identified as Government's Exhibits 1 to 7, inclusive, and ask you if you have ever seen those before.
A. Yes, sir, I have.
Q. When was that?
A. When the FBI agent came up to the office.

Mr. Hyde: I am going to object to this as not being in the presence of the defendant. I further object on the ground that it is incompetent, irrelevant and immaterial, and in violation of the constitutional rights of this defendant, under amendments 4 and 5 of the Constitution and under the Act of Congress of the United States which was passed June 15, 1917, and ask that the same be excluded from the record and from the evidence.

The Court: Overruled.

55 Mr. Hyde: Exception.

Q. (By Mr. Shelton) You saw them first at your office?
A. The FBI agent came in—
Q. My question was, where you saw them.
A. In the office.
Q. In your office?

A. Yes, sir.

Q. Did you see them again after that?

A. Yes, sir.

Q. Where was that?

A. In your office.

Q. Now, I will ask you to look at those instruments and tell the Court what they are.

Mr. Hyde: To save the record, and in order that I may not be constantly objecting, may my objection go all the way through to this testimony concerning these cards?

The Court: That is satisfactory with the Court.

Q. (By Mr. Shelton) Go ahead.

A. This is a notice of classification. Any time a registrant's classification changes it is compulsory that we send him out a notice, one of these notices.

Q. (By Mr. Shelton) As clerk of Board 7, do you in your official capacity have charge and possession of cards of that character?

A. Yes, sir.

56 Q. Are such cards isued to anyone except registrants by your board?

A. No, sir.

Q. Are notice of classification cards such as these, issued to you by the United States Government?

A. Yes, sir. They are issued by Selective Service, state headquarters, the supply division, upon request.

Q. And they are the property of the United States Government?

A. Yes, sir. Also, when I say they are the property of the United States Government, Selective Service is charged with the postage on those cards, on those cards at 1½ cents each and we pay for the postage except the ones that are mailed in the office and we have to account for them, but you get a credit back on the postage.

Q. Now, Mr. Witness, are you acquainted with the defendant Harris, the little fellow there, the red faced fellow behind his counsel?

A. No, sir.

Q. Did you ever issue any cards, notice of classification cards, to him, such as the exhibits here?

A. No, sir.

Q. Did you ever give him or anyone else permission to take cards such as the exhibits here from your office?

A. No, sir.

Q. Where is your office located?

57 A. 825 Cotton Exchange Building, Oklahoma City.

Q. What kind of an office is it?

A. Well, you walk in and there is an ante room with a railing around it, about six by eight feet, I imagine. Then there is a high counter, there is a board on the top on the south side about a foot wide that the registrant can make a change of address, and they usually lean their elbows on it and it has a door that will open to a 45 degree angle. In other words, if the door comes around it will only open 45 degrees. The supplies are kept against the wall to the west of that.

Q. The door which you make reference to is an inside door?

A. An inside door only waist high. The office has one table, four desks and there are some filing cabinets where four of us can work, three or four.

Q. What kind of outer door do you have?

A. A regular office door with a lock, something like a Yale lock or some cylinder lock.

Q. The ordinary Yale lock?

A. A Yale or similar lock.

Q. Now, the cards that you keep there in your office similar to the ones I have here in my hand, are they accessible to the public?

A. No, sir.

Q. Is there any particular reason why they are not?

58 Mr. Hyde: To which we object as incompetent, irrelevant and immaterial. The Court can take judicial knowledge of Government property.

The Court: Overruled.

Mr. Hyde: Exception.

A. What was the question?

Q. (By Mr. Shelton) I just asked you if there was any particular reason why these were not accessible to the public.

A. They get into the hands of the wrong people.

Mr. Hyde: I am going to object to this for the further reason that this would not be binding on this defendant.

Mr. Shelton: I will withdraw the question.

Q. (By Mr. Shelton) Now, Mr. Witness, I hand you Government's Exhibits 1 to 7 inclusive, and ask you if at the time you first saw them that there was any identification on them to indicate that they came from your Board.

A. Yes, sir, this is the Board stamp.

Q. Is that the stamp in the upper left-hand corner of each exhibit?

A. Yes, sir.

Q. Now, is there any other way you can identify these cards as having come from your office?

A. Only that upper stamp which gives the Board location, the Board number; then your code number which
59 one of those numbers represents "Oklahoma", the State of Oklahoma, the other number, Oklahoma County, and the other number, the Board in Oklahoma County.

Q. Now I will ask you to again examine Exhibits 1 to 7, inclusive, and state to the Court whether or not that card has been altered from the ordinary and usual manner in which it is fixed before you mail it out to a registrant?

A. Here is a card—

Q. You can answer that question yes or no.

A. No, that is different than we mail out.

Q. Now explain the difference in the manner in which that card has been altered and changed.

A. If you will notice right under this square here it says "Local Board" the date stamp, with code. That means we have to use a proper stamp on that and the stamp they used on these seven cards is a stamp we never use for that purpose.

Q. Now, the stamp that has been used on that card, on the exhibits here identified, what was it used for by your office?

A. This stamp that is on these cards is only used on a registrant's folder cover right under his order number and serial number, we use this stamp, and under the regula-

tions, in case a man sends an appeal the file leaves the office and is mailed to the appeal board, and that is for identification so it will be returned to the proper
60 board, and that is the only time we use that stamp.

The proper stamp is a dated stamp which shows on there. It shows right under there, the local board, date stamp, with code.

Q. I call your particular attention to Government's Exhibit No. 7. I will ask you if the stamp on that exhibit is the correct and proper stamp which is used by your Board on notice of classification cards.

A. Yes, sir.

Q. I will ask you if you recall when that was placed on that particular exhibit.

A. In your office.

Q. Now, was that correct stamp made by your stamp?

A. Yes, sir.

Q. As clerk of Board No. 7, did you give anyone permission to use the stamp there shown in the upper lefthand corner of each of the exhibits, 1 to 7 inclusive, in marking these cards?

A. No, sir.

Q. I believe you also testified you gave no one permission to take those cards from your office.

A. No, sir.

Q. You mentioned the stamp placed on those cards had a certain identification mark?

A. Yes, sir.

Q. Does the stamp you see on those exhibits bear
61 that identification mark?

A. Yes, sir.

Q. And that is peculiar to your Board only, is it not?

A. Yes, sir, the only Board in the United States that has that code on it or rather combination of code numbers.

Q. Are those, in the process of the conduct of your office, ever stamped up in advance?

A. No, sir. We don't know how many cards we are going to use on a particular day. In other words, a girl fills out the classification after a Board meeting, addresses it. Then this is your dater stamp. She will date it and stamp it, and put them back in the folder, and then after

the Board meeting bring all of the files to my desk and enter it on the ledger and then I mail the cards out.

Q. (By the Court) In other words, that stamp is not used until the card is filled out?

A. No, sir.

Q. (By Mr. Shelton) Do you have the two stamps with you that were used on Exhibit 7, and if so, will your mark them on this sheet of paper and mark which is the correct and which is the incorrect stamp?

A. Would you want this to show any particular date?

Q. No, it doesn't make any difference so it is the correct stamp or in-correct, just whichever way you want to word it.

Q. (By Mr. Shelton) I hand you what has been
62 marked for identification, Government's Exhibits 8 to 18, inclusive, and ask you if among your supplies you have such cards as those?

A. Yes, sir.

Mr. Shelton: Mark this Government's Exhibit 19, and we wish to offer that in evidence.

Mr. Hyde: Same objection.

The Court: Overruled.

Mr. Hyde: Exception.

(Exhibit 19, being a yellow sheet with the impression of the two stamps on it as requested by counsel, is received in evidence.)

Q. (By Mr. Shelton) Did you on or about the 20th of July, 1944, or prior thereto, give anyone permission to take those cards from your office?

Mr. Hyde: To which we object for the further reason there is no testimony so far that these were taken from his office. I have one in my possession here that is just exactly like those.

Mr. Shelton: We haven't offered them yet. This is for identification but we will tie them up later on.

The Court: With that understanding I will allow him to answer.

A. Cards like these are issued to every Board,
63 draft Board, office to be filled out when a man registered, the first, second, third, fourth, fifth and registrations. They are all identical.

Q. (By Mr. Shelton) My question was, did you give anyone permission to take those cards from your office?

A. No, sir.

Q. Did you give the defendant here permission to take them?

A. No, sir, to the best of my knowledge I have never seen the gentleman.

Cross Examination.

Q. (By Mr. Hyde) As a matter of fact, you don't know those cards came from your office, do you?

A. No, sir, I don't.

Q. They are blank registration certificate cards, are they not?

A. Yes, sir.

Q. And the identical cards are printed, distributed and circulated in every draft office in the United States?

A. Yes, sir.

Q. They are all the same, aren't they?

A. Yes, sir.

Q. And likewise, the notice of classification, the printing matter on that is exactly the same except that there is a number for each draft board throughout the United
64 States on the notice of classification, isn't there?

A. What is that question again?

Q. I say, the notice of classification is identical in every office in the United States, isn't it, the blank notice of classification?

A. Not necessarily.

Q. What is the difference?

A. They have been revised several times.

Q. I mean various registration periods, the blanks are the same. We have had six or seven registration periods; have we not?

A. Six.

Q. The Government printing office printed these at the request of the various state or local units throughout the

country and they were shipped out to the state headquarters in each instance, weren't they?

A. National headquarters. It may be the National Selective Service Headquarters will want so many to be distributed to the different supply sections of the various states. Upon proper requisition then the local board in turn requisitions them from the state supply office.

Q. I say for each registration period you had notices of classification furnished you on this, as well as other offices, throughout the United States and they were all identical, weren't they?

65 A. All except the fourth registration.

Q. What is the registration of the cards which are offered in evidence in this case?

A. What are you talking about, classification *of* registration?

Q. No, the registration.

A. The registrations are all the same. The classification is different. Pardon me, I made an error.

Q. You say the classification is different?

A. Yes, sir.

Q. And that was different on the fourth registration?

A. The fourth registration did not get a classification.

Q. Do you know what classification these cards were printed for?

A. They are for the first, second, third, fifth and sixth.

Q. You say your office is in the Cotton Exchange Building?

A. Yes, sir.

Q. And you are connected with local draft board No. 7, aren't you?

A. Yes, sir.

Q. And you have a large number of employees, or did have at different times in your office, haven't you?

A. No, sir.

Q. How many have you had?

A. Five.

Q. And how many have you had all told from the

66 beginning?

A. Five. I mean at various times. If one would quit I would hire someone else. Five besides myself.

Q. But the employees would shift, wouldn't they?

A. Yes, sir.

Q. That is, when you started out to take over in the beginning on classification No. 1, registration No. 1, if you had four or five employees in the beginning—is that all you had in the beginning?

A. I was not there at the beginning, in 1940. We started out with one employee, and then built up to three employees.

Q. There has been a large turnover, hasn't there?

A. I wouldn't say there has been a large turnover.

Q. About how many would you say?

A. Since I have been there there have been two or three.

Q. You have been there how long?

A. Two and one-half years.

Q. You have a total now of four besides yourself?

A. At the present time we have two besides myself.

Q. It has fallen off lately, hasn't it?

A. It must have. They are cutting down expenses.

Q. As I understand your testimony, up in the left-hand corner it says "Selective Service" and there is a place for the local board, Oklahoma County and the date, isn't there?

A. The instructions right under there say what stamp to use and dater code.

67 Q. I hand you my own registration card, draft board No. 1, I believe.

A. Right here, local board, date stamp with code.

Q. The printing you have just read is on every card that is published, that is to say, on the notice of classification of every draft card in the country, isn't it?

A. Oh, no, I wouldn't say what happened before my time.

Q. I mean since you have been on the board.

A. Since I have been on the board.

Q. And if mine was in the first registration, would you think that it was on all of them?

A. Not necessarily. This was put on, "5-27-43." That was the change of your classification "23-AH", the date it was mailed out of that office. That is no sign whether you were in the first registration or not. That didn't make any difference. It is the date that is mailed out.

Q. You say you never do insert the printed matter above in the left-hand corner on the face of these cards until when?

A. Until the girl files this part out here, addresses it,

and after she has done that she puts it beside her typewriter, puts this over it and comes down with it. Then it is put back in the folder and put on the clerk's desk to make the proper entry in the classification records.

68 Q. Where is that sheet of paper you stamped on a minute ago? Did you bring with you the stamp that you ordinarily use?

A. One of them.

Q. I notice here that the date you stamped on this exhibit is October 18. Why is that, if that is a regular stamp that is in use in your office?

A. I don't know why that was.

Q. Have you used that stamp since October 18 at all?

A. I don't use this stamp. The girls use it. We have three of these in the office identically the same. At the present time we only have two girls and we only use two of them.

Q. What is the total number of registrants that you have in your office, the total number of notices of classification you have in your office?

A. The total number of registrants?

Q. Yes.

A. Not counting the fourth, between 6300 and 6400.

Q. And with reference to the notices of classification, that varies, does it not, from time to time with each individual dependent upon his physical and mental condition or the type of work in which he is engaged?

A. That has something to do with it, the change of regulations.

69 Q. So when you say you have 6400 registration certificates, that is, 6400 people registered, naturally then you may have as a result of that 6400 issued, and several times that number of notices of classification.

A. Oh, yes, that is right.

Q. It could involve as many as 30,000 or 40,000, couldn't it?

A. Yes, sir.

Q. So with the requisitions you have made for each registration period since you have been there, you never know how many you are going to need of these, do you? You never know how many of the notices of classification that you are going to need because the needs may vary?

A. I couldn't tell down to the exact one. They come 500 to a package.

Q. What do you do with those? They come 500 to a package from the main office, what do you do with them?

A. We check the requisition against the supplies and we put them in the supply section.

Q. Where is the supply section located?

A. At one side of the office.

Q. Who is in the office?

A. Two girls and myself.

Q. I wish you would name the girls, and their addresses if you can, who have worked in that office since you have been there, that have worked with these classification
70 cards.

A. Mrs. Robertson.

Q. Where does she live and what is her first name?

A. I don't know. She is married. I don't know her first name.

Q. Did you employ her?

A. Employed her. We call her Mrs. Gladys Robertson and she lives on West 39th Street.

Q. How long has she lived there?

A. They bought a place there two or three months ago.

Q. How long has she been in the employ of the draft board?

A. She was there about a year and a half.

Q. Did you hire her?

A. She was there when I came.

Q. Who is the other lady that works there?

A. Mrs. Flippo.

Q. What is her first name?

A. I don't know her first name.

Q. Where does she live?

A. At present she is in California with her husband. He is in the Navy. She quit and went to him when he was ordered to the west coast.

Q. Who else was in the office?

A. Miss Garrison.

Q. What Garrison is that?

A. She lives on West 39th Street.

71 Q. Married?

A. Married.

Q. What is her first name?

A. I don't know.

Q. Did you employ her?

A. I employed her.

Q. What method did you employ in getting these people?

A. Through civil service.

Q. Is there anybody else that works in that division?

A. Miss McCollum. I hired her through civil service about two and a half months ago, two months ago.

Q. You say you have been with this office about two and a half years. These registration certificates as well as the notices of classification could have been printed and furnished to some office at the time of the first draft, could they not?

A. Some of those cards?

Q. Yes.

A. Yes, I imagine it is possible.

Q. In other words, this notice of classification here you say is identical with the first, second and third—

A. It is used for the registrants.

Q. I understand that but eliminating this printed matter—

A. They are used in blank.

Q. That could have been used in the first, second,
72 third or fifth or sixth registration, could it not, any office of the United States?

A. That blank card could have been issued.

Q. That is what I am getting at, the blank card. I say, eliminating that which is contained in the left-hand corner on the face of the classification, notice of classification, together with the registration certificate in blank, these two cards and all of the cards that you have examined could have been furnished by the federal government through the channels you have described to any office in the United States, could they not?

A. Not with that stamp on the corner they could not, the ones I saw in evidence.

Q. I say eliminating this stamp.

A. Oh, yes, if it was in blank you wouldn't know where they came from.

Q. Eliminating this printed matter up here, the stamp matter that you say does not bear any semblance of rela-

tionship to your stamp, eliminating that, they would have blank registration certificates, blank notices of classification, would they not, and they could have been furnished by the channel you have described to any government draft office in the United States, could they not?

A. Yes, sir.

Q. All you mean to say is from your testimony that these instruments that have been introduced in evi-
73 dence you have witnessed here, are identical with the ones that were furnished to your office, that they are government property and that the printed or stamped matter in the left-hand corner on the face of the instrument does not bear the stamps you people use.

A. They bear the stamp that we use but not the stamp we use for that particular thing. It is our government stamp which has been used on that but an improper stamp. Someone used that stamp who didn't know what they were doing.

Q. Do I understand you to say then from your testimony that you have stamps up there that are the same size of the ones that are used on these notices of classification here?

A. We have three of these that are the proper stamps to use. Here is a stamp here that is an improper stamp but was used on those cards that were introduced in evidence, and this stamp here was always kept in one of the girl's desks.

Q. Then this stamp here that you have brought from your office evidently was used by someone on these blank notices of classification?

A. Yes, sir.

Q. There is no doubt about that, is there, in your judgment?

A. No, sir.

74 Q. You say these notices of classification, that they could total as many as five or six times the 6400 descriptions of the registrant or registration certificate; your classification could total thirty or forty thousand?

A. They use five or six of those to one of the registration cards.

Q. Do you mean then that you have 6400 people registered, five times that, or as many as say 40,000, of these

notices of classification, have gone through your office and you say, as I understand your testimony, that at no time are any of your employees ever permitted to place a stamp in the left-hand corner on the face of this such as was done in the seven or eight cards that were found here?

A. No, sir.

Q. Of course, your girls never did make a mistake, did they?

A. It is not the idea of making a mistake. It is knowing that a stamp like this is the correct stamp to use and this is the incorrect stamp, this stamp being on the top of the desk all the time, and this stamp being in the desk drawer, and this stamp is not being used over once a day at the most, and this one is being used forty or fifty times a day, well, more times than that. The girls would use this, I would say, every fifteen minutes during the day.

Q. This could have been stamped on there before you were ever employed there, couldn't it?

75 A. I don't think so. I am not going to say it couldn't be, but I am going to tell you what the regulations are. The regulations then were the same as they are now and a person don't go out of their way to do something wrong normally.

Q. As I understand your testimony, you are not supposed to put that stamp on there until you send these notices out.

A. That is right.

Q. But what I am asking, these stamps could have been made up here on the face of this by someone in your office long before you were ever connected with that department. Is that possible?

A. Well, I don't know what other people would do. Anything is possible in this day and time. I know it has not been done since I have been there.

Q. What I am getting at is, you had this stamp there in the office when you came there?

A. Yes, sir.

Q. And the regulations were the same?

A. To use a proper stamp.

Q. I understand that, and the cards were the same?

A. Yes, sir.

Q. So that it is possible, is it not, that these blank notices of classification which were exhibited to you could have been

stamped improperly by someone long before you were ever in the employ of that office, is that right?

A. What do you mean "improperly"?

76 The Court: I think the Court knows what you mean.

A. It means they could have a dater stamp on there with the wrong date on it but they couldn't use the stamp that was used on these other cards.

Q. (By Mr. Hyde) Did you mention the lady's name of McCollum?

A. Yes, sir.

Q. Do you know where she has lived the past two years?

A. I know where she lives now and when she came to work for us. She lives at the same place that the defendant lives and she came to work for us after these were supposedly stolen from the office.

Q. That is a conclusion, is it not?

A. No. I saw those cards before she went to work.

Q. Do you know of your own personal knowledge that these cards were stolen from your office?

A. No, I wouldn't say that I know they were stolen but I will say that if they were not stolen from the office they were stolen from some other office and were brought into our office and used our stamp on the card.

Q. What you want the Court to understand is that the stamp itself was used in your office? That stamp was used by someone outside of your office?

77 A. Yes, sir.

Q. And that your stamp was used?

A. Yes, sir.

Q. But you do not mean to say these blank cards, these blank registration certificates were stolen from your office?

A. No, I would not swear to that.

Q. You don't know of your own *personaly* knowledge, do you, that the defendant ever used any of the stamps you had there?

A. No, sir.

Q. Or ever saw these cards until he had them up there at this place where this lady worked who worked for you?

A. She was the latest employee we put on. She has only been there two months. She was hired from the civil service

register upon Mrs. Flippo resigning to go with her husband when he received his overseas orders out in California.

Q. Of course, you never authorized any of your employees to take any of these blank pieces of paper out of your department, did you?

A. No, sir.

Q. They are forbidden from doing that, aren't they?

A. Yes, sir.

Q. They are forbidden to take pencils or any other merchandise belonging to the government away from your office, aren't they?

A. Yes, sir.

78 Q. Do you know whether any of them ever did that?

A. I never have known any one of them to do that, because they all have automatic pencils. I don't mean taking pencils, I mean taking these things.

Q. (By Mr. Shelton) You don't know of any of your employees ever taking any of these cards away?

A. No, sir, if they did they would not be there.

Q. Neither are you testifying these cards were not stolen from your office, are you?

A. No, sir.

Q. The code number to which you have reference is 84 and 109, is it not?

A. Yes, sir.

Q. On the stamp marked on Exhibit 19 as incorrect?

A. Yes, sir, one designates the state and the other the county and the seven is the draft board in the county.

(Witness excused.)

THOMAS G. MELVIN was thereupon called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. Shelton) State your name.

A. Thomas G. Melvin.

Q. You are a special agent of the Federal Bureau of Investigation?

79 A. Yes, sir.

Q. Are you acquainted with the defendant Harris?

A. I am.

Q. When did you first make his acquaintance?

A. On July 20, 1944.

Q. Where?

A. At 2308 North Ellison Street when he was placed under arrest.

Q. At the time that you made his acquaintance did you have any warrant of arrest for him?

A. I had two, yes, sir.

Mr. Shelton: Now, if the Court pleases, we would like permission of the Court, with the agreement of counsel, to introduce in evidence either photostatic or certified copies or copies of those warrants.

Mr. Hyde: It is perfectly all right. We want them introduced ourselves.

The Court: You can use those or I will permit him to have copies made.

Mr. Shelton: We have no objection to using them if they are correct.

Mr. Hyde: I got them from your office directly, certified.

Mr. Shelton: However, I have never had a copy of the motion yet.

80 The Court: You can check them and see if they are correct. They will be admitted in evidence.

Q. (By Mr. Shelton) Prior to going there to make the arrest had you certain other information in regard to the crimes committed?

A. I did.

Mr. Hyde: I wish to object to that as incompetent, irrelevant and immaterial and ask the Court to instruct the witness not to answer until I have made my objection.

The Court: Yes, do not answer until counsel has had a chance to object. Overruled.

Mr. Hyde: Exception.

(Question read.)

A. I did.

Q. (By Mr. Shelton) Had you made an investigation of the two crimes charged before you had warrants issued?

A. I had.

Q. Did you sign the complaint, or do you recall?

A. No, the complaint was signed by Mr. Irwin, I believe, special agent Irwin.

Q. About what time of day did you get there?

A. It was approximately 1:30 p. m.

Q. What were the particular crimes these warrants were issued for?

81 A. One charged the violation of the mail fraud statute and the other charged the violation of the National Stolen Property Act.

Q. Are you familiar with the facts charged there in *onnection* with—

Mr. Hyde: I object to that for the reason his answer is not the best evidence and the warrants themselves are the best evidence.

The Court? What was the question?

Mr. Shelton: I asked him if he was familiar with facts or the basis of the complaint in the warrant?

The Court: Overruled.

Mr. Hyde: Exception.

Q. (By Mr. Shelton) Are you familiar with the facts charged in connection therewith?

A. Yes, sir, I am.

Q. After you arrived at his place at 1:30, what was the first thing you did?

A. I told him that I was a federal officer and that he was placed under arrest.

Q. Was he shown the warrants?

A. He was.

Q. Were they read to him?

A. He was given the warrants to read and he read them.

Q. Now, after he had read the warrants did you make a search, you and the other agents present, of his

82 premises?

A. Yes, we did. I, however, was absent part of the time.

Q. What other agent assisted in that search?

A. Special agent James Ware and three other special agents.

Q. Was that search made soon after the arrest?

A. It was. It was made instantly thereafter.

Q. Did you help in making that search?

A. Yes, I did, although, as I stated, I was gone part of the time I did help.

Q. Now, in the search that you made, what were you looking for?

A. We were looking for two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company, probably by the defendant.

Mr. Hyde: Just a moment. Will Your Honor instruct the witness not to say that because that is in violation of the law. It is not responsive to the question, and it is a conclusion on his part, and I ask the Court to strike it from the record.

The Court: It will be stricken from the record.

Mr. Shelton: That part where he said it was probably the defendant?

The Court: Yes.

Q. (By Mr. Shelton) Well, to clarify that, I will ask you if you did not have some evidence that it was the defendant?

83 Mr. Hyde: To which we object as incompetent, irrelevant and immaterial, not the best evidence, and hearsay.

The Court: As I understand it, he was charged with the crime of forging—

Mr. Hyde: Violation of the mail fraud statute.

Mr. Shelton: Defrauding the Mudge Oil Company and forging a bogus check.

Mr. Hyde: But not a violation of the National Stolen Properties Act.

The Court: That is true.

Mr. Hyde: Like the witness said a moment ago—

Mr. Shelton: Yes, I think he would start with that too.

The Court: I know I read the charges when I was going over the briefs.

Mr. Hyde: Causing the checks to be sent through the mail, then interstate commerce.

The Court: That is a mail fraud charge.

Q. (By Mr. Shelton) Is that correct, Mr. Witness?

A. It is my recollection he is also charged with a violation of the National Stolen Property Act. I may be incorrect, however.

84 The Court: I believe both of them are under the mail fraud statute.

Mr. Hyde: Yes, sir.

Mr. Dierker: One of them is the interstate transportation of a forged and altered instrument.

Mr. Hyde: That is right.

Q. (By Mr. Shelton) What else were you searching for, Mr. Witness?

A. We were searching for any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a confidence game of this type.

Q. Now, did you ever see the government's exhibits 1 to 18?

A. Yes, I did.

Q. Where did you first see them?

A. I first saw them shortly after Mr. Ware found them in a bureau drawer in the defendant's residence at 2308 North Ellison.

Q. You didn't find them yourself?

A. No, I did not.

Q. Was the envelope in which they were contained open when you first saw the envelope?

A. Yes. When I first saw them it had been opened.

Q. And is this the envelope?

A. This is the envelope in which they were found,
85 and the defendant admitted this was in his handwriting.

Q. This identification mark on there, did you sign that?

A. No, Mr. Ware signed it. I can identify the envelope.

Q. Was that the envelope on the inside of the one the court is examining?

A. Yes, it was.

Q. Of course, Mr. Ware is in a better position to explain the exact appearance of this at the time they were found than you are?

A. Yes, sir.

Mr. Shelton: We would also ask permission of counsel to introduce in evidence copies of the two complaints on which the two warrants were issued.

Mr. Hyde: Copies of what?

Mr. Shelton: The complaint.

The Court: Instead of the originals.

Mr. Hyde: That will be perfectly all right.

The Court: They will be admitted in evidence.

Mr. Hyde: They are attached to copies of our motion.

Mr. Shelton: If they are, we will let those be admitted, the warrants and complaints attached to defendant's motion to suppress the evidence will be considered in evidence here as exact copies of the originals.

The Court: They will be admitted by agreement.

Cross Examination.

86 Q. (By Mr. Hyde) You don't even know, do you, Mr. Witness, what you did charge this defendant with before the United States Commissioner, do you?

A. It was my understanding they charged a violation of the National Stolen Property Act and the mail fraud statutes, two warrants.

Q. Well, in any event, the record will speak for itself, will it not?

A. Yes.

Q. You signed the complaint. Did Mr. Irwin sign it?

A. My best recollection is Mr. Irwin signed it. I may have signed it too.

Q. Now, then, you came back down in the middle of the afternoon on the day you procured these warrants of arrest and obtained a search warrant over your signature to search this man's automobile, didn't you?

A. I did.

Q. And stated, in substance, in that application, and affidavit you filed under oath what you were seeking, did you not?

Mr. Shelton: To which we object as being incompetent, irrelevant and immaterial and not germane to the issues in this case.

The Court: Overruled.

Q. (By Mr. Hyde) Did you do that?

A. Yes.

87 The Court: I can't see how it has anything to do with this matter.

Mr. Hyde: What I expect to show is that he was searching with a search warrant the automobile for exactly the same things which he was searching the house for.

The Court: I will let you introduce that search warrant. Will you agree, Mr. Shelton?

Mr. Shelton: Yes, he may introduce it and the warrant subject to our objection as being incompetent, irrelevant and immaterial, which I understand is overruled.

The Court: You can correct it if it should be found not to be a correct copy.

Mr. Hyde: I might state this is a duplicate original, also procured from the United States Attorney's office.

Q. (By Mr. Hyde) Now, were you seeking anything in your search of the automobile other than what you were seeking in the house?

A. No.

Q. In other words, you had this man under arrest and in the middle of the afternoon you came down to the United States Commissioner's office, did you not, to obtain a search warrant to search his car. That is true, isn't it?

A. That is true.

88 Q. And you were unable to find anything in the house concerning the charge or charges that you had him arrested for, that is true, isn't it?

A. No.

Q. Had you seized any checks of the Mudge Oil Company, any blank checks or any cancelled checks of the Mudge Oil Company?

A. No.

Q. You had this man charged with using the mails to defraud, causing these checks to go through the United States mails, did you not?

A. Yes, sir.

Q. Now, did you expect to find the letter which contained the checks, the blank envelope that included the checks? Did you expect to find that at his place?

A. No.

Q. Did you expect to find the check itself there?

Mr. Shelton: What check?

Mr. Hyde: The $25,000 check.

A. (By the witness) We thought we might find a photostatic copy there.

Q. (By Mr. Hyde) That is what you were looking for, was it?

A. We were looking for anything—

89 Q. That you might find?

A. No, anything which would indicate a violation of the mail fraud statute and the National Stolen Property Act.

Q. You didn't have him charged with that, did you?

A. That was the violation we were investigating.

Q. Did you have him charged with that, or do you know?

A. That is my best recollection.

Q. At this man's place, there was a bedroom and a living room?

A. Yes.

Q. Was he in the living room?

A. Yes.

Q. Did you arrest him in the living room?

A. Yes.

Q. Did you handcuff him in the living room?

A. Yes.

Q. Did you make him stay in the living room?

A. Not all the time, no. He moved around.

Q. Was he handcuffed from 1:30 or 2:00 o'clock until 7:30 or 8:00 o'clock that night in his own house?

A. No, I don't think it was that long.

Q. Did you come back to the United States Commissioner's office with these search warrants and he insisted on writing upon the original that you returned and filed in this court between 6:00 and 7:00 o'clock at night and
90 he was still under arrest and still handcuffed. Did he do that?

A. The search warrant?

Q. On the search warrant itself.

A. I don't recall that.

Q. And you have insisted, have you, not, many times since his arrest and since he has been out on bond that he ought to bring it to you and give to you the copy of that. Have you done that?

A. No.

Q. Well, in any event, if he insisted upon signing his name upon the search warrant that you returned and filed with the United States Marshal and the clerk, that will speak the truth, will it not, if his signature is on there and the time, if it was written in your presence, will it not?

A. Yes, it will.

Q. Was it written in your presence?

A. I don't recollect.

Q. How long would your tell the Court you kept this man handcuffed in his living room with your guns drawn on him?

A. The gun was holstered as soon as the handcuffs were put on. It couldn't have been over five minutes.

Q. How long did you keep him handcuffed and keep him in the living room?

A. Well, I will say I wasn't there during the en-
91 tire time of the search.

Q. When did you leave?

A. I don't recall definitely. I think probably after half an hour.

Q. As a matter of fact, you didn't go down to the United States Commissioner's office until four o'clock, did you?

A. Yes, but I was in the United States Attorney's office drawing up search warrants prior to that time.

Q. You went out there at 1:30, and how long did you stay, would you say?

A. Oh, I would say practically half an hour.

Q. Then you came back at what time?

A. Around 5:00 I believe.

Q. How long did you stay?

A. Until around 6:30, I believe it was.

Q. Did you take the defendant directly from his home to the jail?

A. No, we were making arrangements with the United States Commissioner to arraign him as soon as possible, and we had some difficulty, encountered some difficulty in locating the Commissioner, so that is why we stayed out there longer than we would have otherwise.

Q. You didn't stay out there with four other agents and break into all of his furniture and equipment out there?

A. We were just making a thorough examination
92 of the premises.

Q. How many rooms are there in this place?

A. As I recall it, there are a living room, bedroom, kitchen and a bath.

Q. Did you go into the bedroom, lift up the mattress, lift up the carpets off the floor and search everything in his bedroom?

A. Yes, I think I said the search was thorough.

Q. I understand, but I want to go into the details of it. You took the sheets and the pillow cases and everything off the bed and looked under the mattress and in between the sheets and pillows and in the closet completely, didn't you? Isn't that a fact?

A. I don't recall the exact details that you mention now, but as I say, I don't remember. I wasn't there all the time but the search was as thorough as we could make it.

Q. Did you go through the linen closet where he keeps his clothes, his suits?

A. I believe we did.

Q. You went through the kitchen and looked under the cover?

A. You mean I did personally?
Q. It was done under your direction?
A. Yes, sir.
Q. You ordered that done, did you?
A. Yes, sir.

Q. You assigned one man to each room and told
93 them to "tear the joint down and find this stuff"?

A. No, I didn't. I told them to make a thorough search.

Q. What room did you search?

A. I didn't search any room particularly. I supervised it largely.

Q. And in this indictment it is alleged that these certificates which have been introduced in evidence were concealed in an envelope on which he had written "George Harris, personal papers" and hidden in the second drawer of the small bureau in the bedroom of his apartment. Is that true?

A. Yes.

Q. And the paper was sealed, the envelope was sealed, wasn't it?

A. It is my understanding it was sealed. As I said, I wasn't actually there when it was found but when I saw it the seal was broken.

Q. Did you break it?
A. No, I didn't break it.
Q. Did you authorize it be broken?
A. Not specifically, no.

Q. Were you present in the office of the United States Attorney when a letter that was taken from his person was opened?

A. There was no letter taken from his person.
94 Q. Where was it taken from?

A. It was taken from the office down in the Perrine Building, 424 Perrine Building.

Q. That is Mr. Otis Garrett's office, isn't it?
A. That is right.

Q. You searched that office and found a letter that came through the mail to him, didn't you?
A. That is correct.
Q. You also forced him to open that letter?

A. We didn't force him to open it. He volunteered to open it.

Q. You seized that leter, did you not, down at this office you mentioned, 424 Perrine Building?

A. Yes.

Q. Did you find any checks, stubs, or anything connected with the violation of the statute for which he was under charge down there?

A. No.

Q. You were the one in charge of this raid out there. Did you know the statute required you to furnish this defendant with an inventory of everything that you took?

A. I made an appointment with him to furnish that but he didn't keep the appointment.

Q. Did you make an inventory to furnish it to him at the time you had him out there under arrest?

95 A. No.

Q. Is it your understanding that you, as an officer of the FBI have a right to take merchandise or anything and take it down to the office and then ask him to come down later after he gets out of jail and you will give him an inventory?

A. I thought things would be expedited by having him come down to the office.

Q. You had five men out there. You were there from 1:30 in the afternoon until 6:00 or 7:00 o'clock at night, weren't you?

A. Yes.

Q. Why didn't you furnish him a list of the things you took from him?

A. Because I thought that would be a better way to handle it; that he would be satisfied, he had a complete list of everything.

Q. Would he know everything you men took there when you had him handcuffed in the front room?

A. He was present when everything was taken.

Q. Did you let him go around with you when you made this search in the various rooms?

A. My best recollection is he did.

Q. In other words, four men were searching four differ-

ent rooms at the same time and you expected this
96 man to be in every room at the same time you men were making this search to find out what you took. Is that right?

A. As I say, I wasn't there during the entire time.

Q. You didn't furnish him a list, did you?

A. No, sir.

Q. And you haven't to this good day, have you?

A. Because he failed to keep his appointment then.

Q. You wanted him to come to your office. As a matter of fact he came to your office and you didn't offer to give him back everything you had seized? You didn't furnish him an inventory and the only thing you gave back to him was his own registration certificate. Isn't that right?

A. No, I think we furnished him certain numerous other things.

Q. Why didn't you give him an inventory then?

A. Because as I said, we had an appointment with him later to give it to him.

Q. He went to your office on two different occasions to get this stuff and you gave him some of the things back but you refused to give him an inventory, didn't you?

A. No, I did not.

Q. You haven't given it to him yet, have you?

A. That is because he failed to keep that appointment.

Q. He came up there and talked with you, didn't he?

A. He did because he had certain specific things he
97 wanted back which we returned to him.

Q. Did he ask you to furnish him a list?

A. No, he did not. I volunteered to do it.

Q. But you didn't do it?

A. For the reasons I have stated.

Q. Since the date of this man's arrest there has been a federal grand jury convened in this district, has there not?

A. Yes, there has.

Q. And you had this man arrested and charged with the violation of the mail fraud statute, didn't you?

A. Yes.

Q. The information you volunteered a moment ago, that this man broke into the Mudge Oil Company's office and stole some checks, did you tell that to the grand jury and secure an indictment against him?

Mr. Shelton: We object to that as incompetent, irrelevant and immaterial and not within the province of this witness.

The Court: Yes, I think it is immaterial.

Q. (By Mr. Hyde) In any event, this defendant is not charged by indictment from this last grand jury, or any grand jury, with a violation of the mail fraud statutes, is he, or any offense you had him charged with back at the time you arrested him at his apartment. That is true, isn't it?

98 Mr. Shelton: We object to that as being incompetent, irrelevant and imaterial, not proper evidence.

The Court: I think it is incompetent. You admit that to be a fact, and if he wants it in the record I will let him put it in. I am not going to consider any incompetent testimony.

Mr. Shelton: I think anything pertaining to that is incompetent. I don't even admit it at all.

The Court: Do you admit that to be a fact, if it is competent? I am not going to consider any incompetent testimony that goes in here, but I find sometimes in court cases where there is no jury it saves time to permit testimony to go in rather than exclude it.

Mr. Hyde: The only thing about it, I would be forced to call the clerk, even though he objected to it, so I am just trying to save time. Do you still object?

Mr. Shelton: Yes, sir.

The Court: Objection sustained.

Mr. Hyde: Exception.

Q. (By Mr. Hyde) Now at the time you made this arrest you did not arrest him at all for the violation of the Selective Service Act, did you?

A. No.

Q. You did not have any information directly or indirectly, did you, that George Harris, the defendant in

99 this case, had these cards in his possession, these registration certificates, did you?

A. No.

Q. And you don't know of your own personal knowledge, or even heresay, of a man in the United States, anywhere in this country, who has a registration certificate, that is in those clasifications, that got it directly or indirectly from my client, do you?

Mr. Shelton: Objected to as improper cross examination.

Mr. Hyde: It goes to the very essence of the matter he was arrested for.

Mr. Shelton: That is an unanswerable question and improper cross examination.

The Court: It would not be necessary to prove that. I will let him answer it though.

A. (By the witness) I don't understand the question.

Q. (By Mr. Hyde) Do you know of anyone in the United States, any man in the service or not in the *service,* that has a classification card or registration certificate that he got from my client, the defendant over here?

A. No, I don't.

Q. You didn't have any information about that, did you?

A. No.

Q. Now, if you had had any kind of information about that at the time you went out to his home, you would have charged him with that crime, wouldn't you?

Mr. Shelton: We object to that.

The Court: Sustained.

(Witness excused.)

JAMES C. WARE, was thereupon called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. Shelton) State your name.

A. James C. Ware.

Q. Are you a special agent of the FBI?

A. I am.

Q. Were you present on the date the defendant was arrested?

A. I was.

Q. What was the basis of your knowledge on which he was arrested and when was the arrest made?

A. The warrants were issued as a result of a complaint charging the defendant with violations of the National Stolen Property Act and the mail fraud violation.

Q. Do you know who signed the complaint?

A. I believe special agent Irwin.

Q. There has been some discussion here with reference to the National Stolen Property Act indicating that
101 actual complaint and charge in this case was not the National Stolen Property Act. Now, I will ask you if Title 415 or Title 18, Section 415, which is the section number and title shown in the complaint, is the Act which is commonly referred to by the agents of the FBI as the National Stolen Property Act?

A. The facts set out in the complaint charge the violation of the Act, as I understand it.

Q. And that is the name by which you refer to that Act, is it not?

A. That is right.

Q. Now, after the arrest of this defendant you participated in a search of his premises, did you not?

A. I did.

Q. Tell the Court what you personally were searching for.

A. I was searching for anything which may have been the means through perpetrating any of the charges alleged in the complaints.

Q. Did you find Government's Exhibits 20, 21 and 1 to 18, inclusive?

A. I did.

Q. Tell the Court where you found them.

A. These were taken from the bureau drawer of George Harris' bedroom, the second drawer in his bureau.

Q. Explain to the Court how they were arranged.

A. The cards were inside a small envelope, inside
102 of the outside envelope, and it was sealed there.

Q. (By the Court) The green cards, they are in the small envelope?

A. Yes, sir.

Q. (By Mr. Shelton) Where in the bureau drawer did you find that exhibit?

A. It was in the second drawer at the bottom under some underclothes.

Q. Was the drawer closed?

A. Yes, sir.

Q. You opened the drawer and found those exhibits under some clothing?

A. Yes, sir.

Q. Were they hidden from your view until you removed the clothing?

A. They were.

Q. Now, can you specify anything in particular that you were searching for that would have been the means to commit the offenses that were charged? What did you have in mind particularly, if anything?

A. It is my understanding that we were searching for two blank checks and also searching for writing materials, burgler tools or anything of that nature which may have been used in perpetrating the crimes alleged, charged.

Q. I will ask you if in your search you found some 103 other articles.

Mr. Hyde: To which we object as incompetent, irrelevant and immaterial, if the Court please, the same having been seized in violation of the defendant's constitutional rights, an invasion of his rights under amendments 4 and 5, and for the further reason that the evidence which they are now describing and which has been described already by the witness, was not in furtherance of anything in connection with which he was then being arrested and charged with.

The Court: Overruled.

Mr. Hyde: Exception.

Q. (By Mr. Shelton) I hand you here certain articles of merchandise. State whether or not you found those in his residence.

A. Yes, sir.

Q. State what they are and how many.

A. There are two pen points inside of the envelope now. These two tracing pens—

Mr. Hyde: I object to the word "tracing." That is a conclusion of this witness.

The Court: I will sustain the objection. You can describe the pens.

A. Two pens with removable points—

Mr. Hyde: It speaks for itself and I object to
104 the description.

Q. (By Mr. Shelton) Do you know of your own knowledge what they were used for?

Mr. Hyde: I object to that—

The Court: I will sustain the objection.

Mr. Hyde: He can answer it yes or no.

Q. (By Mr. Shelton) Do you know of your own knowledge what pens like those you hold in your hand are used for.

A. No.

Q. What else do you have?

A. Five fountain pens, one ordinary pen; a pen and pencil combined.

Q. Now, I hand you certain other instruments here contained in this envelope and ask you to state if you found those there at his place?

A. Yes, sir, they were found there also.

Q. What are those, if you know?

A. These are small pieces of celluloid.

Q. Do you know of your own knowledge what they are used for in the confidence game?

Mr. Hyde: Answer that yes or no.

A. No.

Mr. Shelton: We wish to introduce all these in evidence for whatever value they may have, and as counsel says, let them speak for themselves.

105 Mr. Hyde: To which we object for the same reason, incompetent, irelevant and immaterial, and seized

in violation of the constitutional rights of the defendant and unoffending in themselves.

The Court: Overruled.

Mr. Hyde: Exception.

Q. (By the Court) Where did you find these?
A. (By the witness) They were in the dresser.
Q. (By Mr. Shelton) I hand you certain other exhibits which I will ask to be identified as Government's Exhibit No. 22, a bundle. I hand you Government's Exhibit 22 and ask you if you found that on the defendant's premises.
A. I did.
Q. Where was that?
A. It was in a dresser drawer in the bedroom.
Q. I will ask you to tell the Court what those are and if you know what they are used for, of your own knowledge, and if you have superintended the use of them yourself?

Mr. Hyde: To which we object as incompetent, irrelevant and immaterial, and not binding upon this defendant.

The Court: Let him answer what they are.

A. These are 27 pieces of celluloid.
Q. (By Mr. Shelton) What are they commonly known as in the confidence game?

Mr. Hyde: Objected to as incompetent, irrelevant
106 and immaterial and there is no evidence in this case that my client is a confidence man.

Mr. Shelton: We have him charged with stealing in this case.

Mr. Hyde: You haven't proved it.

Mr. Shelton: We will prove these are burglar's tools if you will let me.

The Court: He can't testify what these were used for because he doesn't know.

Mr. Shelton: Do you know of your own knowledge what those can be used for?

Mr. Hyde: To which we object again. An axe can be

used to kill a man and it can be used to chop wood. It is incompetent, irrelevant and immaterial and no foundation laid to show this court from this record that my client is a confidence man or had anything to do with this theft.

Q. (By the Court) Where did you find them?

A. They were in the bedroom in the dresser drawer.

Mr. Hyde: I renew my objection.

The Court: I will let the testimony in at this time. If I come to the conclusion it is incompetent I will strike it and not consider it.

Mr. Hyde: Exception.

A. They can be used as burgler tools for entering an office, most offices.

107 Q. (By Mr. Shelton) Have you used them to open a Yale lock yourself?

A. I have.

Q. Can you demonstrate to the Court how they can be used as burglar tools to enter an office and open a lock?

A. I can.

Q. Will you be glad to do that in the presence of the Court—

Mr. Hyde: To which we object as incompetent, irrelevant and immaterial and not binding upon this defendant, on the same principle that I cited, that an axe can be used to cut wood and also to kill a man.

The Court: Objection sustained. It is not necessary that he make that demonstration to the Court.

Mr. Shelton: I think the demonstration should be made in the record to show they can actually be used for that purpose for the court to see.

The Court: At this time I will permit him to do it. If I later find it is improper I will exclude it and not consider it. You may demonstrate it on this door right here.

Mr. Shelton: Let the record show that in the presence of the Court, the defendant and his counsel, the witness on the stand demonstrated the opening of the back door to

the court room, which has a lock similar to a Yale
108 lock, and that the night lock was fastened, with the instrument which we offered in evidence called by the witness burglar tools, and at this time we wish to introduce them, as well as these other exhibits found in the course of the search.

The Court: They will be admitted.

Mr. Hyde: To which we object.

The Court: Objection overruled. I will exclude them if I come to the conclusion they are not competent.

Q. (By Mr. Shelton) Was the defendant asked whether or not it was his writing?

A. Yes, sir.

Q. Did he identify it?

A. He identified it as his own handwriting.

Q. That is the part of the envelope marked "George Harris, personal papers"?

A. That is right.

Q. The other writing on the envelope was placed there by whom?

A. Placed there by me.

Q. For what purpose?

A. Purely for identification.

Q. And that reads "7-20-44 taken from the second drawer."

A. (Reading) "Small bureau in bedroom at 2308 North Ellison Street, Oklahoma City, James C. Ware, spe-
109 cial agent, FBI."

Q. Was the defendant present when these different exhibits here were found by you?

A. He was in the livingroom. May I describe that?

Q. Yes, you may.

A. The bedroom and living room are connected by a large double door and he was seated in the west end of his living room in a position where he could see into the bedroom and watch our actions.

Q. Did he make any statement in your presence in regard to any of those exhibits?

A. Nothing, except he was asked specifically as to these classification cards, at which time he said he found them—

Q. Never mind about that.

Mr. Hyde: Let him answer. I insist that go into the record. He said he found them, didn't he? Is that what you said?

A. That is what I said.

Q. (By Mr. Shelton) Did he volunteer the statement he had found these classification cards when asked about them?

A. Yes.

Q. Now, are you familiar with the Selective Service Act?

A. In a general way.

Q. You are familiar with what is generally known as a violation of the Selective Service Act?

110 A. Yes, sir.

Q. As soon as you found that exhibit there, the envelope with the cards in it, did you open it?

A. I did.

Q. Did you show them to the other agents present?

A. Yes, sir.

Q. And also showed them to the defendant?

A. Yes, sir.

Q. And that is when he made his explanation?

A. Yes, sir.

Q. Did you know in a general way when you found those that the possession of them was a crime under the Selective Service Act?

Mr. Hyde: To which we object as incompetent, irrelevant and immaterial, his knowledge or lack of knowledge of the law is immaterial in this case.

The Court: I think it is immaterial but I will let him answer. It would not be prejudicial.

A. Yes.

Cross Examination.

Q. (By Mr. Hyde) What time did you go out there?

A. At approximately 1:30.

Q. What did you go out there for?

A. I was assisting Mr. Melvin in serving the war-

111 rants on Mr. Harris.

Q. You were in company with three or four other

agents, weren't you, four others besides yourself? There were five of you?

A. At which time?

Q. When you went out to this place.

A. I went with Mr. Melvin.

Q. When you got out there there were five of you there, weren't there?

A. Mr. Melvin and I were there alone at the time of making the arrest.

Q. And the three others came—

A. Later.

Q. When you went out there you put this man under arrent, when you went in the living room, and handcuffed him and sat him down, didn't you?

A. Yes, sir.

Q. Mr. Melvin told him if he made a move he would kill him, didn't he?

A. I didn't hear that.

Q. You kept the handcuffs on him from the time you got there at 1:30 until seven o'clock, didn't you?

Mr. Shelton: To which we object as being incompetent, irrelevant and immaterial, whether they had him handcuffed or not.

112 The Court: Overruled.

Q. (By Mr. Hyde) Did you do that?

A. I left for some period of an hour or so and I can't speak for that time but during the rest of the time he was handcuffed.

Q. The five agents that were out there all told, each of you were assigned by Mr. Melvin to make a search of the rooms, weren't you?

A. That is right.

Q. Which one did you search?

A. The bedroom.

Q. The defendant was in the living room, wasn't he.

A. Yes, sir.

Q. Handcuffed?

A. Yes, sir.

Q. You were out there searching for goods, wares, merchandise, articles, or anything in connection with the use

of the mails to defraud, and also in connection with the violation of Section 415 of Title 18?

A. Yes, sir.

Q. And that is what you refer to as the National Property Theft Act?

A. National Stolen Property Act.

Q. In any event you were there in connection with the use of the mails and other transactions connected with
113 the theft of checks or monies, funds that originated with the Mudge Oil Company transaction, weren't you?

A. Yes, sir.

Q. That is what you were out there for, isn't it? You had no knowledge or information, direct or indirect, of any kind or character that he had any selective service cards in his bureau drawer or anywhere else, did you?

A. I had none.

Q. And you had no information, directly or indirectly, that the defendant over here had ever furnished blank registration certificates or notices of classification to any man in the United States, had you?

A. I had none.

Q. You fellows seized his registration card, didn't you?

A. I didn't do it.

Q. You know it was taken, don't you?

A. Yes, sir.

Q. It was later returned to him. Your office checked up on that, didn't it?

A. I didn't check on it.

Q. Well, do you know whether or not your office did?

A. No, sir, I do not.

Q. Did you find anything wrong with his registration card?

A. I can't answer the question.

Q. Do you know whether or not your office did?

114 A. No, sir, I do not.

Q. Now, this indictment charges that these registration classification notices, as well as the registration certificates, were sealed in an envelope on which he had written "George Harris, personal papers," and hidden in the second drawer of the small bureau in the bedroom of

the apartment where this defendant lived. That is true, isn't it?

A. Yes, sir.

Q. You had been directed by your superior officer, you and the other agents who were out there that day, to make a thorough search of this place, weren't you?

A. Yes, sir.

Q. Looking for anything you could find in connection with the violation of the law for which he was then arrested, weren't you?

A. Yes, sir.

Q. You have previously testified you had no information, directly or indirectly, that he had these service cards in his bureau drawer?

A. That is right.

Q. They are in blank, aren't they?

A. Yes, they are in blank.

Q. With the exception of the printed matter up in the left-hand corner on the face of the card itself?

A. That is correct.

115 Q. You had to get into his bureau drawer. It was closed, was it?

A. Yes, sir.

Q. He had the clothes in there, didn't he?

A. Yes, sir, a few pieces.

Q. You had to get under the clothes to find these, didn't you.

A. I did.

Q. Then when you found it, it was sealed in an envelope that has been offered in evidence, wasn't it?

A. That is right.

Q. And you had to break that seal open, didn't you?

A. Yes, sir.

Q. You broke that open at the time, that sealed envelope marked "George Harris, personal papers" having in mind that you might be able to find something in connection with the Mudge Oil transaction. That is true, isn't it?

A. That is true.

Q. And that is what you were looking for, isn't it.

A. Yes.

Q. You then found these other things that had been introduced in evidence, didn't you?

A. Yes, sir.

Q. And they were secreted too, weren't they?

A. Why, yes.

116 Q. This isinglass business?

A. You mean the isinglass?

Q. Yes, that was in his drawer, wasn't it, wrapped up in a little towel?

A. Yes, sir, just like that.

Q. You took that —

Mr. Shelton: Tissue paper.

A. (By the witness) Tissue paper.

Q. (By Mr. Hyde) You took the fountain pens?

A. Yes, sir.

Q. Then you took a great many other things away from him, didn't you, in a bundle about a foot and a half long and about a foot and a half wide away from his house, didn't you?

A. I don't remember that.

Q. This defendant objected strenuously to you people making a search of his home from the time you went there until you left and told you you didn't have any right to do it, and you told him you had a warrant for his arrest and you were going to do it anyway, didn't you?

A. I don't believe he objected strenuously.

Q. Of course, he was handcuffed all the time, wasn't he?

A. That is right.

Q. You didn't threaten to kill him if he didn't sit down, did you?

A. We did not.

Q. Did Mr. Melvin?

117 A. I didn't hear him say that.

Q. How long did he keep the gun on him?

A. Until he was handcuffed.

Q. As a matter of fact, he kept it on him for an hour, didn't he?

A. He did not.

Q. And didn't he direct you men to make a search around there while he held him in there with the gun cocked on him for an hour? Didn't that happen?

A. He did not.

Q. You never made an inventory of the things that were seized out there, did you?

A. No, sir.

Q. Why?

Mr. Shelton: To which we object. If he didn't, he didn't.

Q. (By Mr. Hyde) Did Mr. Harris ask you to furnish him one?

A. No, sir.

Q. He didn't ask you to furnish him a list of the things you were taking from his apartment?

A. No, sir.

Q. Didn't do that at any time?

A. He didn't ask me.

118 Q. Or he didn't ask Mr. Melvin in your presence?

A. Not in my presence, if he made such a request.

Q. Now, at the time you men went out there, you were armed with these warrants of arrest, weren't you?

A. Yes, sir.

Q. Two complaints had been filed and a warrant of arrest issued?

A. Yes.

Q. You had no search warrant, did you, to search his home?

A. No, sir.

Q. Now, at the time you broke open that envelope Mr. Harris told you, did he not, that he had found those cards?

A. Yes, sir.

Q. You have since made an investigation and you found out that an employee of the Draft Board No. 7 lived in this identical apartment that he occupied and lived there immediately preceding the time that he moved there. You found that out, didn't you?

A. I made no investigation. I knew nothing of that until Mr. Bower made the statement this afternoon on the stand.

Q. You mean to say that George Harris didn't tell you that this apartment was occupied by two women that he never saw or heard of in his life and that both of them worked down at the draft board?

A. He did not.

119 Q. You have since found out that two men lived there that worked at the draft board?

A. No, sir.

Q. You didn't know it until this afternoon?

A. It didn't concern me at all. I wasn't interested.

Q. He didn't say anything about that?

A. No, sir.

(Witness excused.)

Mr. Shelton: The Government rests.

Mr. Hyde: Comes now the defendant and at the conclusion of all the testimony offered for and on behalf of the Government and renews his motion to suppress the evidence heretofore filed, and his motion to quash the indictment heretofore filed, and in that connection demurs to all of the evidence offered for and on behalf of the government for the reason and upon the grounds that the evidence is wholly insufficient under the law to show that this defendant violated any law of the United States of America, and that applies to each and every count charged against him, each and every count, and for the further reason that all the evidence for and on behalf of the government is in violation of the fourth and fifth amendments to the constitution of the United States and of the Act of Congress passed on June 15, 1917, and that the offer and *in* reception in evidence by the Court of such evidence on the part of the government was in violation of his constitutional rights as heretofore set forth in the brief filed by the defendant on a motion to suppress and the motion to quash the indictment.

120 The Court: Motion denied.

Mr. Hyde: Exception.

Mr. Hyde: And the defendant further moves to strike from the record all of the testimony with reference to the articles which were offered in evidence on behalf of the government, the same having been obtained by the government agents in violation of law in such cases made and provided, and urged that as an additional ground of the demurrer which we interposed.

The Court: Overruled.

Mr. Hyde: Exception.

The Court: The matter will be submitted. I prefer to consider it.

Mr. Shelton: Are you going to offer any evidence?

Mr. Hyde: No, sir. The defendant rests.

Mr. Shelton: If I did not offer the exhibits, all the exhibits referred prior hereto, they are offered in evidence.

The Court: They will be admitted.

Mr. Hyde: I assume this motion which I have filed to suppress should be marked as an exhibit.

(Thereupon the motion above referred to was identified as Defendant's Exhibit No. 1, being the motion to suppress evidence and the petition to return private papers and books and other property to the defendant.)

121 (No further proceedings were had at this time.)

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122 And Thereafter, and on the 18th day of December, 1944, the trial of the above cause was reopened and resumed at Oklahoma City, before Hon. Stephen Chandler, the appearances being the same as heretofore.

The Court: In connection with this case, I indicated I desired to hear some more testimony on the question of the apartment where these girls lived out there. I got the idea in my mind, as to whether one of these girls who worked at the draft board that lived in this apartment prior to the time the defendant had lived there, and I asked the United States Attorney to clear that matter up. I would like to know one way or the other what the facts are.

Mr. Hyde: Very well.

Mr. Shelton: The Government's position is we have no desire to reopen the case but the witnesses are available and if I understand it correctly, we have them down here at the request of the Court and the case is to be reopened on the request of the Court. Is that correct?

The Court: Yes. I would like to know the facts on that point. While it might not seem material to you, it does to me. There was evidence introduced in the record and I could not come to any conclusion in regard to it.

123 Mr. Shelton: Does the Court desire for me to put the evidence on? Of course, I am familiar with it.

The Court: Yes, I would like to know what the facts are.

VIRGINIA MCCOLLUM was thereupon called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. Shelton) State your name.
A. Virginia McCollum.
Q. Where do you live at the present time?
A. I have been living at 1311 Northwest 16th Street.
Q. What is your present business or occupation?
A. At present I am working for Draft Board No. 7 as a clerk.
Q. Did you at one time live at 2308 Ellison Avenue?
A. North Ellison, yes, sir.
Q. Just tell the Court as best you can when you first moved there.
A. Well, in October, October 25, 1942, I moved to 2310 North Ellison.
Q. (By the Court) October 25, 1942. That is next door to this place?
A. Yes, sir, on the north side. I am not positive what day I moved to the south side, but it was approxi-
124 mately the first of May.
Q. (By the Court) May 1, 1943?
A. No, sir, 1944.
Q. 1944. You moved to the—
A. I am not positive of that date.
Q. You moved to the south side. That is 2308?
A. 2308, yes, sir.
Q. Is that a two story apartment?
A. No, sir—well, yes, sir—there are two apartments downstairs and two bedrooms upstairs; two apartments downstairs, one on each side.

Q. You lived there from October 25, 1942 to May 1, 1944 on the north side?

A. I am not positive of that last date. Approximately, I am not positive. We lived on the south side approximately six months.

Q. You think that began May 1, 1944?

A. Around there, yes, sir. I am not positive of that date.

Q. (By Mr. Shelton) You moved from there when?

A. I went and talked to this lady at 1311 Northwest 16th on June 25. That was on Sunday, and I moved on Tuesday evening, the 27th.

Q. (By the Court) You lived at this place from May 1 to June 27?

A. 27th. It was on Tuesday.

125 Q. (By Mr. Shelton) You moved to an apartment nearby?

A. I moved to 1311 Northwest 16th, which is the place where I board and room.

Q. Now, do you know who moved in the apartment at 2308 after you moved away?

Mr. Hyde: Of your own personal knowledge.

Q. (By Mr. Shelton) Of your own knowledge.

A. I talked to the fellow who was going to move down. He came down that evening and I talked to my landlady—

Mr. Hyde: I object to that as hearsay.

Q. (By Mr. Shelton) That is what he told you, the man you talked to?

A. Yes, sir.

Q. Did you talk to him?

A. Yes, sir. He came down that Tuesday evening.

Q. (By the Court) Came down from where?

A. He was rooming upstairs.

Q. Do you know how long he had been rooming upstairs?

A. No, sir, because I didn't know him.

Q. (By Mr. Shelton) Do you see that man in the court room you talked to?

A. No, sir. He is in the Navy, a lieutenant in the Navy.

Q. The man you talked to about moving into your apartment?

A. Yes, sir. He is not in this room.

Q. (By the Court) He was a lieutenant in the
126 Navy?

A. Yes, sir.

Q. (By Mr. Shelton) You don't know whether this man, Mr. Harris, moved in that apartment after you left?

A. No, sir. I never did see him until this morning.

Q. When did you go to work for Draft Board No. 7?

A. September 21, 1944.

Q. That was after or subsequent to the time that you moved out of this apartment known as 2308 North Ellison?

A. Yes, sir.

Q. Do you have the pay roll records to show when you went to work for the draft board?

A. Also the appointment showing when I started.

Q. Do you also have a receipt of some kind to show when you moved into the other apartment at the time you moved?

A. Yes, sir. This is June 26.

Q. This instrument we are looking at here is a receipt that you received from the landlord where you moved. Is that correct?

A. Yes, sir.

Q. And this was dated on the day you moved or before you moved or when?

A. I had to pay it the first of June, 1925, which was Sunday, in order to hold the apartment.

Q. Do you need this?

A. No, sir.

127 Q. (By the Court) It is definite you moved out of this apartment June 27, 1944?

A. Yes, sir, that evening.

Q. You think you moved in May 1, 1944?

A. Approximately. I wouldn't say what date. It was approximately the date.

Q. It was shortly after the first of May you moved into that apartment from across the hall?

A. Yes, sir. I could call my landlady and find out exactly.

Q. Why did you move from the north side to the south?

A. Because it would be cooler.

Q. In the summer time?

Mr. Shelton: I wish to introduce these exhibits in evidence, Government's Exhibit 24, 25 and 26.

Mr. Hyde: No objection.

Q. (By Mr. Shelton) During the time you resided in this apartment in question, 2308 North Ellison, did you have in your possession any classification cards or registration cards of any kind or character?

A. No, sir.

Q. When you left that apartment did you leave any classification cards or registration cards there at the apartment, as far as you know?

A. No, sir.

128 Q. I point out to you Mr. Harris, the defendant in this lawsuit, and ask you if you ever at any time in your life, under any circumstances, let him have any classification cards, or draft cards of Local Board No. 7 of Oklahoma City?

A. No, sir.

Q. Did you ever see the defendant before this morning?

A. Not to my knowledge. I may have met him on the street, but I wouldn't have known him.

Q. Have you, since you have been employed by Draft Board No. 7 taken away from the office any blank classification or registration cards?

A. No, sir, nothing has ever been taken out of there.

Q. Or have you known of or seen any of the other employees who worked there during the time you were employed there, take any blank classification cards or registration cards away from the office?

A. No, sir.

Q. I will ask you if it is not the instructions you are not to do that?

A. That is correct.

Cross Examination.

Q. (By Mr. Hyde) Miss McCollum, you lived for approximately two years in Mrs. Cargill's apartment, did you not?

A. Approximately, a year and a half.

129 Q. As I understand your testimony, you moved over on the north side, which would be 2310, and then you moved over here in April or May?

A. Approximately the first of May; I am not positive.

Q. Into the apartment at 2308?

A. Yes, sir.

Q. Ellison Avenue. And you moved out on Tuesday before July 1?

A. I moved on June 27.

Q. That would be on Tuesday, you said, before July 1?

A. Yes, sir.

Q. But you say that this man did not move into that apartment on July 1?

A. I am not positive. I never saw the gentleman until I came here this morning, to my knowledge.

Q. This lieutenant you referred to, this Navy lieutenant, did you not know he just stayed there one night?

A. I am not positive because I wasn't over there at that time.

Q. You worked at the draft board once before, did you not?

A. I worked at Draft Board No. 1.

Q. You worked at this draft board before you worked at Draft Board No. 7, didn't you?

A. Yes, sir.

Q. How long had you worked at the Draft Board
130 No. 1?

A. It was approximately around the 1st, I believe it was the 1st of March of 1942, to the last of January, 1943.

Q. Then you went to work for the Douglas plant?

A. I went out to OCAD.

Q. All that time you were living with Mrs. Cargill?

A. I was living in Cargill's apartment.

Q. Then you went to work for Draft Board No. 7 after you quit the OCAD?

A. After I moved from North Ellison.

Q. And you say you went to work for that Board in September?

A. The 21st, 1944.

Q. Now, 2308 and 2310 are together, aren't they, that is, just right next door to one another?

A. One is on the north side and one is on the south side of the house.

Q. The buildings are connected, aren't they?

A. There is no way to get through. You have to go outside.

Q. It has the same retaining wall?

You don't go through the same door to get to 2308 and 2310?

A. No, they are separate apartments.

Q. It is in the same building?

A. Yes, the same building.

Q. Now, when you left 2308, did you leave any papers at all there?

131 A. I am not positive. I cleaned up there but I can't swear I took everything.

Q. I will ask you if it is not a fact you left an envelope there in which there was a note, a letter from you or a letter to you from a lieutenant concerning a brief case?

A. No, sir.

Q. Had you loaned your brief case or had anyone loaned a brief case to you?

A. I do not possess one or never did borrow one.

Q. No one left one in your possession with some papers in it?

A. No, sir.

Q. Did you leave in this same envelope some slips, contribution blanks, envelopes for one of the churches?

A. What slips?

Q. You know these little contribution envelopes.

A. What envelopes do you mean?

Q. Did you leave any little blank church envelopes showing the contribution that would be made to the church?

Mr. Shelton: In order to be fair with the witness, I think counsel has those instruments he speaks of and he ought to exhibit them to the witness.

Mr. Hyde: I am just asking if she did have those. I will state to the Court I didn't bring them with me. I have the letter I will exhibit to you.

132 The Court: You may answer.

A. I had envelopes where I gave contributions to the church but if I left them—I might have left them—they might have been old ones.

Mr. Shelton: What church?

Q. (By Mr. Hyde) I don't recall the church. Do you

know whether or not the name of the church was printed on there?

A. I think it was on the outside. I am not positive.

Q. Well, the church is immaterial anyway, but you don't recall any letter you wrote or any letter you received concerning the brief case?

A. I never had any correspondence with a lieutenant and I never had any connection with a brief case.

Q. (By the Court) Who lived there with you?

A. At 2310?

Q. Who lived with you at 2310 and 2308?

A. At 2310, a Mrs. Esther Shaffer.

Q. (By Mr. Hyde) Did Ethel Wiggins live with you?

A. Later on.

Q. Did she live with you at 2308?

A. Yes, sir. Just a few weeks and then we moved across.

Q. (By the Court) Who was the one who lived with you at 2310?

A. Miss Shaffer.

Q. Where does she work?

133 A. She is dental assistant at OCAD.

Q. Did she ever work at the draft board?

A. No.

Q. Who lived with you when you went to 2308?

A. Ethel May Wiggins, employed at Douglas.

Q. Did she ever work at the draft board?

A. No, sir.

Q. (By Mr. Hyde) Is she here now?

A. She is at Douglas.

Q. That is the lady who lived with you at 2308?

A. Yes, sir.

(Witness excused.)

Mr. Shelton: If there is no objection we will withdraw Government's Exhibit 24, 25 and 26, and it is agreed that copies may be substituted. We have two other witnesses available whose evidence is probably competent on the motion to suppress the evidence in this case, and I understand the Court would like to hear their testimony. If that is the Court's desire we will be glad to present them.

The Court: I understand. I don't believe this testimony would be competent as to the guilt or innocence of the defendant in this case. Do you understand what testimony he refers to, Mr. Hyde?

Mr. Hyde: I do not, Your Honor.

134 Mr. Shelton: I will explain to the Court and counsel the nature of the evidence of these other witnesses is that on or about the 6th of March, 1944, these two witnesses saw the defendant Harris in the office of the Mudge Oil Company in Dallas, Texas, and can identify him in their best judgment as being there, which is evidence in connection with, of course, the complaints that were filed against him on which the warrants were issued, that were the basis of the search of the premises in question.

The Court: I don't believe that will be competent on anything except the question of the suppression of this evidence. I think it would be competent on that.

Mr. Hyde: I can't see how it would be competent in this case in either event, Your Honor. If this defendant was being prosecuted for violation of Section 415 of the Penal Code or the conspiracy to commit the substantive offense, I believe not only the substantive offense itself, but also on the conspiracy, as well as this motion we filed to suppress the evidence, it would be competent, but here the Government is seeking to offer testimony and convict this defendant for a violation of the Selective Service Act, wholly unrelated and at a different time.

The Court: I think you are right as to the merits of this case; as to the guilt or innocence of this defendant I don't think it would be proper at all but I will hear it on
135 the suppression of evidence. It may be I will not be able to consider it, but at this time I will let it in, on the question of the motion only, and it will not be considered as to the guilt or innocence of this defendant. It will be considered only on the motion to suppress this evidence as to whether or not I should exclude all this evidence, these instruments that have been introduced in evidence.

Mr. Hyde: Under the Leftwich case, I think Your Honor

will recall in that case they were searching for something connected with the offense for which he was not being prosecuted. In this case, a totally different case, they are seeking to convict him for an offense based upon a warrant issued, wholly unrelated to the offense for which he is now being prosecuted.

The Court: That is the question I will have to decide.

Mr. Hyde: As I understood the ruling—I am not trying to keep the evidence out—I just wanted to keep the record straight. As I understood the observation of the Court made before, that if this property was not stolen property you felt as though the position I had taken based upon the decisions of the Supreme Court, that my motion should be sustained, but in view of the fact that now the Government has raised the question that it was stolen property, therefore, you thought perhaps a different rule should
136 prevail, and it was based upon that we furnished Your Honor with the second brief in which we dealt with those questions. Now they are seeking to offer testimony orally, unrelated to the offense for which he is now on trial and at a different time.

The Court: I certainly agree with you it is not competent to prove the guilt or innocence of this defendant in this case, and I will not consider it for that purpose. I will let the evidence in as perhaps having a bearing on the motion to suppress. I will not consider it on that motion if later on I should determine I should not.

Mr. Hyde: I get your point.

The Court: But I am considering the legal points involved and I have not made up my mind definitely as to what the law is, so I think I had better let this in, and if I find I should not consider it, I will not consider this evidence on the motion. In other words, it may be immaterial.

PAULINE HOWARD, was thereupon called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. Shelton) State your name.
A. Pauline Howard.
Q. Where do you live?
137 A. 824 West Tenth Street, Dallas, Texas.
Q. What is your business or occupation? For whom do you work?
A. The Mudge Oil Company in Dallas.
Q. How long have you been in its employ?

Mr. Hyde: I would like to ask that the rule be invoked. I understand there are some witnesses present.

(Hereupon the rule was invoked and the witnesses given the usual admonition of the Court.)

Q. (By Mr. Shelton) Did you state how long you had been employed by that company?
A. Two years. It was two years last month.
Q. And what is the nature of your employment, what are your duties for the company?
A. I do secretarial work for the treasurer and vice president and some book work, keeping of the records and books.
Q. Sometime during the month of March, 1944, did you have occasion to come back to the office late one evening?
A. Yes, sir.
Q. Do you have any way by which you can fix that date?
A. Yes, sir.
Q. Tell the Court what date it was and what time it was and how you fix it.
A. Well, I left the office about five o'clock in the afternoon. I always do—it was at five in the afternoon
138 and I met a girl friend downstairs in the drug store and had a drink with her and talked with her. Then I discovered I had left a magazine upstairs in the office, so she went back up there with me to get it.
Q. About how long was it between the time you met her in the drug store until you went back, give us your best judgment.
A. It was around 30 minutes.
Q. Go ahead.
A. I unlocked the door. The door was locked—

Q. Tell us, if you know, the kind of lock that was on that door.

A. Well, I suppose—I don't know the name of it—my key is a small key with a niche in it. I don't know what you call it.

Q. I will ask you to look at this lock on this door here.

A. Yes, sir. When I leave in the afternoon I flip the button.

Q. Is that similar to the one you have?

A. Yes, sir.

Q. You just flip the button and it is locked on the outside?

A. Yes, sir. You have to use the key.

Q. Would you say this one operates identical to the lock on your door? Examine it and see.

A. Yes, sir. Our door opens the other direction, 139. the other way.

Q. Would your say the lock you just examined on the court room door there operates the same and is identical to the lock on the door of your office?

A. Yes, sir.

Q. Of the Mudge Oil Company. Who was this other lady who was with you on that occasion?

A. Mrs. Edith King.

Q. Is she here with you today?

A. Yes, sir.

Q. Just state in your own words what happened when you got back there to the office. You were to fix the date tell the Court how you fix the date and give us the day of the month this occurred.

A. Well, it was on the 6th because it was on a Monday after I had spent a week end in McGregor, Texas.

Q. The 6th of what month?

A. March, 1944, of this year.

Q. Explain how you fix that date.

A. Well, I talked with my sister and she has a diary she keeps every day, and she shows in her diary that on March 4 and 5, that was Saturday afternoon, and Sunday, that I was at home, and I remember it was the week end before this Monday that Edith and I were having a drink

downstairs after work because I told her about my trip home.

140 Q. It was the Monday following your visit home?

A. Yes, sir. That is why I met her. I don't usually meet her. That is why I can remember because it is unusual for me to meet her after work.

Q. After you went back to the office just tell what happened there.

A. Well, I unlocked the door. I have a key to the office and I heard someone in the office. I heard papers rustle as I was unlocking the door. Our reception room door is close to another door in the inner office and about the same time we opened the door and walked into the reception room, a man that was in the next office, I could see his shadow through the frosted glass came into the reception room, through this other door and I was very surprised that anyone was in the office.

Q. (By the Court) You mean another office in your suite of offices?

A. Yes, sir.

Q. (By Mr. Shelton) Was this man a stranger to you?

A. Yes, sir. I had never seen him before.

Q. Did he have any connection with the office you knew about?

A. No, sir. That is what I asked him.

Q. Had you ever seen him before that night?

A. Not that I know of, no, sir.

141 Q. Tell us what took place there.

A. Well, I asked him what he wanted, or *of* I could help him, or why he was in the office at that time, or something to that effect. I was very startled that he was in the office and I explained to—it seemed to be necessary that I explain, and I explained I was Miss Howard and that I worked there, and he said that he was—

Mr. Hyde: I am going to object to this as incompetent, irrelevant and immaterial and not binding on this defendant.

The Court: The objection will be sustained.

Q. (By Mr. Shelton) Since you have been here today have you had occasion to look at the defendant Harris here in this case and inspect him?

A. Yes, sir.

Q. Have you heard him talk?

A. Yes, sir.

Q. Have you been close to him, where you could look at him and have you looked at him quite extensively since your have been here this morning?

A. Yes, sir, I have.

Q. Tell the Court whether or not you can identify this man as being the man there in that office at that time.

Mr. Hyde: To which we object as incompetent, irrelevant and immaterial, upon the ground and for the
142 reason that it is undertaking to show a state of circumstances alleged to have occurred long before the offense for which the defendant is now being prosecuted by the Government in this case, and wholly unrelated.

The Court: I think your objection is good as to the merits of this case. I will not consider it for that purpose and I am doubtful whether I will be able to consider it on the motion, but I will let it in at this time and if I find it is not competent I will not consider it.

Mr. Shelton: It goes purely to whether or not our search was legal.

Mr. Hyde: Exception.

(Previous question read: "Tell the Court whether or not you can identify this man as being the man there in that office at that time.")

A. Yes, sir. He has on different clothes and no hat, but I feel sure—he seems to be the man that I saw there in the office. His clothes are different now. That is the only difference I can see from the man I saw in the office that afternoon.

Q. Have you any particular reasons you want to give for your identification of him?

A. Well, he is the same size, and his face and head, and I talked to him face to face for just a few minutes but then the other time I was looking at him from the back,
and his shoulders and the way he walks—that is
143 what I saw mostly, because I didn't talk with him but two or three minutes in the office, and he walked

away from me in the office and I could see the way he walked and studied that because I had never seen him before, and I was still wondering, definitely wondering what he was doing in the office.

Q. Then you base your identification upon the general appearance of his face?

A. Yes, sir.

Q. Upon his size?

A. Yes, sir, and he talked with me but not very plainly, but the tone of his voice, sounded like it did today.

Q. Is his voice and talk peculiar in any way to you?

A. Well, it is rather shrieky. I didn't know whether that was because he was ill at ease that day or not. I just didn't hardly believe he was in there to see—

Q. You heard him talk this morning?

A. What did you say?

Q. About whether there was some similarity between the talk you heard this morning.

A. Yes, sir, it was a tone or accent, the same way he spoke, which made it hard to understand this morning, and that afternoon in the office.

Q. Where did you hear him talk this morning?

A. Out in the hall.

144 Q. (By the Court) What kind of clothes did he have on then, do you recall?

A. Well, they were shabbier than the clothes the men wear you usually meet in the office. He was dressed very ordinarily but he wasn't very clean and neat or particularly attractive looking.

Q. In other words, he was not as well or expensively dressed as he is now?

A. No, not at all.

Q. Did he have his hat on?

A. Yes, sir, pulled down over his head but I saw his eyes and eyebrows.

Q. Pulled down in front?

A. Yes, sir, and rather a battered up hat.

Q. (By Mr. Shelton). State the conversation that took place there between you and the defendant.

A. Well, I asked him what he wanted or what he was

waiting on and why he was in the office, I forget which. I forget how he worded it—

Q. The substance of the conversation.

Mr. Hyde: May my objection be considered as going to all this testimony?

The Court: Yes, sir, to all this testimony. I don't know myself whether I am going to consider it at all.

A. He said he was waiting for Mr. Mudge; that
115 he was to meet Mr. Mudge there in a few minutes.
I asked him which Mr. Mudge and he said Mr. E. W. Mudge Jr. I rather doubted that because I had an idea Mr. Mudge had gone home to stay that afternoon, and I knew he had left for home the middle of the afternoon, about three or four o'clock anyway, so I stayed in the office awhile just to see if Mr. Mudge did come in, and as he did not, I locked my desk back up. I had opened it in the meantime just to kill time—I locked my desk and I locked the office and I went down the hall to another company's office and used the phone and called one of the men in our company who rides with Mr. Mudge every afternoon and I knew he would have an idea whether he was at home. He said he thought he was. I says, "There is a man up here in our office, I came back after I left at closing time, and he says he is waiting for Mr. Mudge," and I told him that I told him that Mr. Mudge had gone home, that I had asked the man in the office his name—

Q. Do you remember what name he gave?

A. He said Kief. I didn't understand it. He gave it to me twice. I thought if he was known to Mr. Newbury that he would know it.

Q. (By the Court) Do you recall what it was?

A. It was Kief, or something like that, so when I told that name to Mr. Newbury over the phone he thought I meant another name. He said, "Oh, yes," he knew him.
He thought he had come back there to see Mr. Mudge,
116 so I felt a little foolish then for disturbing Mr. Newbury and so I left.

Q. (By Mr. Shelton) Was the defendant still in the office when you left?

A. No, he left about the same time we did only he went down the stairs. I took the elevator.

Q. Who went out of the office first, you or him?

A. I did.

Q. And left the door open?

A. Yes, sir, he was in there.

Q. And he followed you out?

A. The lock was still on it. You see when I unlocked the door once I pushed the button back to keep it unlocked all day. It locks when you shut it, so when I shut the door with him in there it was locked, but I didn't go back —I left the office and went down the hall—

Q. How do you know he left?

A. I saw him. He left out of our office door and walked right by us where we were waiting for the elevator. We had signaled for the elevator and were waiting, and he took the stairway that is right by the elevator door and either went upstairs or downstairs.

Q. You saw him leave and go to the stairway?

A. Yes, sir.

Q. The office that you saw him in first when you entered the office, whose office was that?

147 A. Well, it is what we call our booking office. It is a general office. We all have our desks in our own offices. Then this room has adding machines and books, and a check cutter and our calculating machines and law books, and those things we use in a day's work and we carry them from that room to our desk.

Q. He was in the room where you kept your checks?

A. Yes, sir.

Q. Was the room where you saw him first Mr. Mudge's office?

A. No, sir.

Q. Was he at any time in Mr. Mudge's office that you knew about?

A. I didn't see him go in, no, sir.

Q. I show you a drawing and I ask you if that is a fair representation of the office, and if not, I will ask you to correct it and to designate thereon the different offices and who occupies them and so forth.

A. This has three offices instead of one.

Q. Just show that and mark each office. For instance, the bookkeeping office and where the checks are kept and Mr. Mudge's office and where you stay and where Mr. Newbury stays, and so forth.

A. Shall I just abbreviate the names?

Q. Just write out "Mudge, Jr." You don't need to put his initials in there. Now, I hand you what has been
148 identified as Government's Exhibit 27, and ask you if it is a reasonably fair representation of the floor plan of the Mudge Oil Company's office in Dallas, Texas, with designations as to what employee or officer occupies such room?

A. Yes, sir, that is right except the size of the offices. This is too large and this is too small.

Q. In other words, the drawing is a little out of proportion?

A. Yes, sir, but they are in the right place.

Mr. Hyde: We waive identification but object to its competency.

The Court: It will be admitted.

Q. (By Mr. Shelton) Mudge's office, then, was clear across the reception room from where you first discovered the defendant?

A. Yes, sir.

Q. What floor and in what building is this office?

A. It is on the 15th floor of the Gulf States Building. Our office number is 1500 and we have several offices, but that is our address.

Cross Examination.

Q. (By Mr. Hyde) You said you heard the defendant talk this morning?

A. Yes, sir.

149 Q. Out here in the hall?

A. Yes, sir.

Q. Did you talk to him face to face?

A. I didn't talk to him, no.

Q. Did he talk to you?

A. No, sir.

Q. You didn't talk to him?

A. I said no word to him.

Q. You heard him talk to third persons out here in the hall and from that it is your judgment, I believe you said a minute ago, that he talks like that man you saw in Dallas?

A. Yes, sir.

Q. You haven't seen the man you saw there in the office at Dallas until this morning, then? Is that right?

A. I saw this man and I had not seen him before until he was in the office.

Q. You stated when you talked with this party over the telephone you described the man and gave his name to the party you talked to over the telephone, and he said "Sure I know him and it is all right." Is that right?

A. Not exactly. I didn't describe him. I said there was a man that said his name was Kief or Keeye or something, and he misunderstood me and thought I said a name similar to that.

Q. He told you he knew the man and that it was all right?

150 A. He didn't say it was all right. He wondered why I went up in the office.

Q. You said you felt foolish about calling this man because he knew this man in the office?

A. Yes, sir. It was a name he thought I said.

Q. You say there was a girl with you there in the office?

A. Yes, sir.

Q. When you left to go down the hall to place this telephone call where was she?

A. She was with me.

Q. And this man who was there went out about the same time you did?

A. No. Immediately after I had called, made this call and was leaving the office I was calling from to go to the elevator and he came out of our office.

Q. What was distinguishable about the speech of this man you talked to there in the office of the Mudge Oil Company on March 6 that impressed you? You said you talked to him for a minute or two?

A. Well, it was his accent—I don't hardly know how to describe it. I don't believe he speaks with an accent. It isn't like I talk, though, or you talk.

Q. What was there distinguishable about it then? You say it was not the accent. What was the distinction?

151 A. I guess what I am thinking about is the accent, but I don't know whether that is exactly the word I want to use for it or not.

Q. You say he is about the same size and same shape of his head and different clothes?

A. Yes, sir. He is just better dressed today than at the time I saw him the other time.

Q. And you recognize him by his voice then. Is that right?

A. No, sir. His head. If he had a hat on I believe I would be definitely sure.

Q. You are not definitely sure unless he puts a hat on, are you?

A. The hat wouldn't make all the difference because I am fairly sure as it is because I saw the man and talked to him a few minutes and saw him walk across our office. I stayed in the office about five minutes. I went back and said something to him. I think I repeated what I said at one time, so I would have an opportunity to talk to him and maybe he would tell me who he was, something connected with the business or personally of Mr. Mudges so I would not have to call Mr. Newbury and ask him about it, because I didn't like leaving him in the office after office hours when he didn't have any business being there.

Q. You have never seen that man you say from that moment he left the office until today?

A. No, sir.

152 Q. And that was in March and this is the 18th day of December?

A. Yes, sir.

Q. What time of day was it, you say?

A. It was around 5:30 in the afternoon.

Q. What day of the week was that?

A. Monday.

Q. Who was the first one that you told about this being the man that you saw there?

A. Well, it was a month later.

Q. But you didn't see this man a month later, did you?

A. No, sir.

Q. As I understand you, it was on March 6 you saw him first, and that is the day out here in the hall before court convened you heard this defendant talking to some third person and that is the first time you have seen him since?

A. Oh, yes. I thought you meant discussed the man in our office.

Q. No, have you seen the man?

A. No, not to my knowledge I haven't.

(Witness excused.)

Mr. Hyde: I move at this time that the Court strike the testimony of this witness from the record on the same grounds and for the same reasons heretofore urged.

The Court: The motion will be denied.

153 Mr. Hyde: Exception.

Edith Brown King, was thereupon called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. Shelton) State your name.

A. Edith Brown King.

Q. Where do you live?

A. 318 West Fifth Street, Dallas, Texas.

Q. How long have you lived in Dallas, approximately?

A. Since the early part of 1940.

Q. Are you employed?

A. Yes, I am.

Q. For whom do you work?

A. The Pennsylvania Railroad.

Q. How long have you been an employee of the *Pennsylvania* Railroad, approximately?

A. Since August 1, 1942.

Q. Are you acquainted with Miss Howard who just testified here?

A. Yes.

Q. How long have you known her?

A. I don't know exactly, about three years I would say, since I have been in Dallas.

A. Is the Pennsylvania Railroad office that you
154 work in in the same building in which the Mudge Oil Company office is in?

A. No, it is not.

Q. Are they nearby?

A. Yes.

Q. Do you recall an occasion when you met Miss Howard along in the month of March, 1944, when you went back to her office?

A. Yes, I do.

Q. Just tell the Court how that happened that you and her met on that occasion?

A. We arranged to meet after work, that is, after five o'clock for a cup of coffee. We sat and talked there, oh, I would say 30 minutes approximately.

Q. Where was that you sat and talked?

A. As I recall, it was in a shop adjacent to where she worked, the Gulf States Building.

Q. Take the story from there on and tell what happened.

A. We came out of the sandwich shop and were going to our respective homes, and she remembered she had left something in the office; I believe a magazine, and she was going back for it, and I said, "I will go along and use the phone," so we went up to her office, which is on the 15th floor—

Q. Of what building?

A. Of the Gulf States Building, down the hall, and
155 she unlocked the door, and as we entered we were aware as we entered the reception room that someone was in a private office to our right. We could see someone moving behind this frosted glass door and at about the same moment the door opened and this man came out.

Q. Just tell what happened after that.

A. The room had no lights. There were no lights at all in the office and Miss Howard turned on the lights in the reception room, and I walked around to the desk there in the reception room and sat down to use the phone there. She said something to this man, I don't recall the exact conversation, but something to the effect that we were—"Were you waiting for someone" or "Who are you", I

don't know what she said, and he gave her some sort of answer and she replied: "I am Miss Howard. I work here. Who are you?" He told her he was waiting for Mr. Mudge and she asked him which Mr. Mudge and he said, "Mr. E. W. Mudge, Jr." I was already at the phone then.

Q. The lights were on at this time, were they?

A. We turned the lights on, or Miss Howard switched the lights on. The offices were all dark when we came in.

Q. About how long a time did you have occasion to observe this man in the office there?

A. It was only a short time. I made the telephone call and she went into her office and out again. I should
156 say approximately ten minutes, maybe more or less. I don't know exactly.

Q. Did you apprehend at the time there was some concern about him being there? Did you gather that?

A. Yes. He was caught off guard and we were. We were not expecting to find anyone there.

Mr. Hyde: I object to the conclusion of the witness that he was caught off guard.

The Court: Yes, I will sustain the objection and will not consider that.

Q. (By Mr. Shelton) Just state what happened there, what he did or what you did.

A. He appeared ill at ease. He walked from the offices where he was when we came in through the reception room when I placed my phone call, he walked into another private office and picked up the phone and was on the same line on which I was talking. I was aware that there was someone on the line and I said, "Just a moment, there is someone on the line," or something to that effect, and Miss Howard was in her office, which was across the reception room opposite the office he was in. She called to him something about how to use the phone or how to pull the key out and he dialed but he didn't put in a call. He didn't turn the telephone dial and the call was not put in but before I finished my conversation he was back in the reception room.

Q. Since you have been here this morning have you
157 had occasion to look at the defendant Harris in this case?

A. Yes, I have.

Q. Tell the Court whether or not in your best judgment he is the man that was in the office that evening?

A. He is to my best judgment the person I saw that evening.

Q. Do you want to make any explanation as to why, in your best judgment this is the man?

A. He is about the same build, about the same age, as I recall, his gray hair, his dark clothing, and I think he had on glasses. In fact, I feel sure he was wearing glasses. He had on a hat at the time, and to my best judgment this is the man I saw.

Q. Have you any way of your own to definitely fix that date?

A. No, I haven't.

Q. You do know that it was in March?

A. I do know it was in March and I feel certain it was on Monday, the first part of the month—

Q. But you haven't any definite way of fixing it?

A. I think it was the sixth but I don't have any positive knowledge that it was.

Q. You had been to the Mudge Oil Company offices previous to that, had you not?

A. Yes, sir.

158 Q. The offices in which this man was, were the Mudge Oil Company's offices?

A. Yes, they were.

Q. And the offices in which Miss Howard is employed?

A. Yes.

Q. You had been there, I suppose, to visit her before?

A. Yes, I had.

Mr. Hyde: For the benefit of the record I would like to make the same objection I *hade* heretofore.

The Court: Yes, and it will be overruled and you will be allowed an exception.

Mr. Hyde: I didn't object to the introduction of the testimony because I understood the Court was taking into consideration my previous objection.

The Court: Yes, sir, I consider you objected to all this and will allow you an exception. I don't even know myself whether I will consider it.

Cross Examination.

Q. (By Mr. Hyde) The best recollection you have is that it was on Monday night and it was the 6th of March, now that you have talked it over with your young lady friend that works for this company?

A. To the best of my knowledge that is right.

Q. But you have no independent recollection that was the date?

159 A. No.

Q. But if she says it was March 6 then you know it was that day because there was only one time when this incident occurred?

A. That is right.

Q. You went back up to this office about 5:30 or 6:00 o'clock on that date?

A. Approximately 5:30 or 6:00.

Q. You walked into the office and you observed that there was some man in the adjoining office. You could tell that through the frosted glass?

A. That is right.

Q. The man came out and said something to Miss Howard. He didn't say anything to you. Is that right?

A. That is right.

Q. You said nothing to him all the time you were there?

A. No.

Q. And he said nothing to you?

A. That is right.

Q. She asked him his name and he gave some name, and what name was that?

A. I don't know. His speech was indistinct.

Q. And as I understand it, your object and purpose in going back up there was to use the telephone?

A. That is right.

160 Q. Of course, you immediately proceeded to use the telephone while she was talking with this man, didn't you?

A. Yes.

Q. Then he left and went in another room and your young lady friend also went in another room, didn't she?

A. Yes, sir.

Q. So that separated the three of you, being in three different rooms, didn't it?

A. All adjoining and all with the doors open.

Q. From the reception room you went to what room?

A. I was in the reception room. I didn't go out of the reception room.

Q. From the reception room each of these parties went to two separate rooms, whichever they were?

A. Yes, sir.

Q. Then finally he came back and then your friend left; and then didn't she go down the hall and use a telephone to call somebody about this strange man?

A. I went with her. We left together.

Q. She repeated the name again in your presence, didn't she, over the telephone, of this man to the party she had called over the telephone?

A. Yes, she did.

Q. What name did she repeat?

A. I don't know.

Q. But you understood from the conversation she had over the telephone with one of the officials or em-
161 ployees of the company, from your conversation with your girl friend, you understood that the man she had described and the name she had given was satisfactory to that man?

A. Yes.

Q. You remember that distinctly, do you not?

A. Yes.

Q. Whatever name the party was going under, after she made her investigation she found out that the party that was in the office was all right, whoever it was, you understood that, did you not, from her conversation?

A. Yes.

Q. If she says all told that she only talked to him a minute or two, would you say that was correct or incorrect. If she said she was only up there about five minutes, was that correct or incorrect?

A. I thought we were there longer. I was using the telephone.

Q. You said ten minutes, more or less. It could have been less, couldn't it?

A. It could have been.

Q. This man, whoever it was, had his hat on and you think he had glasses on?

A. I am sure he did.

Q. And he was about the same size as this de-
162 fendant?

A. Yes.

Q. About the same build, you say?

A. Yes.

Q. And his hair was gray?

A. Yes.

Q. Now, this morning out here in the hall you didn't talk to this defendant Harris, did you?

A. No.

Q. He didn't talk to you, or did he talk to your girl friend?

A. No, not this morning.

Q. You heard him talking to some fellows out in the hall, did you?

A. Yes.

Q. This is the first time you have seen this man, I believe, since the time he was in the office down there at Dallas, Texas, you say?

A. To the best of my knowledge it is, yes.

Q. And it is your judgment that this defendant here was in that office on March 6, 1944?

A. To the best of my knowledge, yes.

Q. Now, do you base that upon the fact that he is the same build as this man down there in that office?

A. That, together with his general appearance, his color and his speech.

163 Q. I understood you to say this man you saw in the office there was dark.

A. Dark skinned, yes.

Q. Come up here.

(Defendant approaches the witness stand.)

Q. Look at this man. Is this the man you saw in the office?

A. To the best of my judgment it is.

Q. Is his skin dark?
A. It is ruddy.

Redirect Examination.

Q. (By Mr. Shelton) Does he have any general features in particular that you identify him by?
A. You mean other than his size and coloring—the fact that he wears glasses, and it appears to be the same man. I don't know other than that.
Q. His speech that you spoke of, would you say he talks slow or rapid, or can you explain to the Court the kind of speech that he uses?
A. He mumbled, spoke in a very low voice. He mumbled, he was not distinct. I did not hear his name when he gave it. I could not say that he spoke slowly, more rapid, I guess.

Recross Examination.

164 Q. (By Mr. Hyde) You say he spoke rapidly or slow?
A. He didn't speak slowly when I heard him speak.
Q. But he spoke low?
A. Low.
Q. *Our* here in the hall this morning when you heard him talking was he talking loud?
A. No.
Q. Was he speaking lowly?
A. He was speaking in a normal tone of voice this morning out in the hall.
Q. Then the voice you heard this morning in the hallway here was not the same voice that you heard in the office, was it?
A. Yes, sir, it was.
Q. The same voice?
A. It appeared to be about the same voice to the best of my judgment.
Q. Did he talk in the same manner?
A. Well, the circumstances were a little bit different this morning.
Q. I asked you if he talked in the same manner he did down there?
A. Yes, sir.

Q. Low or loud?

A. In a normal tone of voice this morning.

165 Q. But down yonder it was in an abnormal tone?

A. Well, it was lower or softer.

Q. Did he have the same kind of clothes on?

A. He had on a business suit when I saw him before.

Q. Was he immaculately dressed?

A. No.

Q. Did he appear to be a business man?

A. I suppose so. He was not immaculately dressed. He might have been a bit on the shabby side.

Q. (By the Court) Do you feel he was this man, or is there considerable doubt in your mind?

A. Oh, there isn't a great deal of doubt. I feel sure, to the best of my knowledge, it is the same person.

Redirect Examination.

Q. (By Mr. Shelton) Would you say from hearing the man talk in Dallas and hearing him talk this morning that there was some similarity in the speech?

A. Yes.

Q. Would you say that the speech that you heard, this talk you heard from him, was a distinguishable type of voice and talk that would be easily remembered and recognized?

A. I think so.

Recross Examination.

166 Q. (By Mr. Hyde) What conversation occurred, please, ma'am; just detail what conversation occurred down in this office and then tell us the conversation you heard out here in the hallway.

A. Well, I told you as we entered the office—I don't know what was said other than the fact, each of us looked at the other in a questioning manner.

Q. I object to that if the Court please. I asked her what was said; not her conclusion.

A. I don't recall what was said.

Q. Do you recall anything this man said to either one of you?

A. He told us he was waiting for Mr. Mudge and Miss Howard asked which Mr. Mudge and he said "Mr. E. W. Mudge, Jr."

Q. What else?

A. He said Mr. Mudge had been there and would be back early; that he was waiting for him.

Q. What else?

A. I don't recall anything else he said. I put in my phone call and talked on the phone.

Q. Do you recall anything else now that this party who was in the office on March 6 said in your presence, any other statement at all that he made?

A. At this time I don't recall anything else.

167 Q. Now, out in the hallway this morning, what did this man say out there in your presence?

A. I don't know. I heard him talking but I did not make a note of it. He was talking with you and some other gentleman. I was merely a bystander.

Q. Walking around to observe whether or not it was the same voice. Is that right?

A. That is right.

Q. You walked around out there in the hall for quite a little while, didn't you?

A. Several minutes.

Q. You observed who was talking over there near the window, didn't you?

A. Yes.

Q. You observed us talking over here *hear* the door, didn't you?

A. Yes.

Q. And you were still wondering in your own mind as you walked around whether or not you had ever seen this man before in your life, weren't you?

A. No, I felt I had seen him. I wanted to be sure.

Q. Then you came up close to where he was, did you?

A. Yes, sir.

Q. What was he talking about?

A. I don't know. I was not thinking about what he was saying.

168 Q. You were looking him over?

A. That is right.

Q. You couldn't tell then from his color when you saw him near the window, or his size or his gray hair—he had his hat off out there, didn't he?

A. Yes.

Q. You couldn't tell from his size, from his glasses, from his appearance or the shape of his head or the coloring, or his hair, that this was the man. You had to hear him talk, didn't you?

A. It wasn't that. I was facing the door like. He was between me and the light and I walked around so the light would not shine in my face.

Q. Then you walked on this side and over there near the window, did you?

A. Yes.

Q. Where do you think you heard him talk, two different places or one place?

A. As I recall, I was standing near the window and he was there in the hallway in front of me.

Q. You were near the window yourself, weren't you?

A. Yes. I walked around and leaned on the window.

Q. The window was not between you and him, was it?

A. When I first saw him it was.

169 Q. And after you got over near the window and he was back over this way toward the door with the light shining in at the window, was there anything distinguishable about him that led you to believe then that this man was in that office on March 6?

A. Yes.

Q. But you had to come on around and get up close to him and hear him talk before you would say that, didn't you?

A. I wanted to be sure.

Redirect Examination

Q. (By Mr. Shelton) When you heard him talk this morning you were at all times within 10 or 15 feet of him, weren't you?

A. Yes.

Q. Could you hear the tone of his voice very distinctly?

A. Yes, sir.

Recross Examination.

Q. (By Mr. Hyde) How close did you get to him in this office in Dallas. Did you get within five feet of him?

A. Yes.

Q. That would be about like this, wouldn't it (illustrating)? Did you get this close to him?

A. Maybe not quite that close but we were in the same room.

170 Q. Did you get close enough to him down there? You say you were in 10 or 15 feet of him this morning.

A. I am sure I was close.

Q. And you were within five to ten feet of him this morning?

A. Yes, sir.

Q. Then if you were within five to ten feet of him this morning and within five to ten feet of him down there in Texas for 10 minutes—

A. It might not have been 10 minutes.

Q. Five minutes, then, would you need to hear his voice to determine whether or not that was the man?

A. His voice, because it is unusual, helps me in my own mind to prove to myself it was the same person, to the best of my judgment.

(Witness excused.)

Mr. Hyde: We make the same motion to strike all this from the record.

The Court: Motion denied and exception allowed.

PAULINE HOWARD was hereupon recalled, and testified as follows:

Redirect Examination.

Q. (By Mr. Shelton) You are the same Miss Pauline Howard who testified previously?

A. Yes, sir.

171 Q. There has been some misunderstanding here in the record about the name that you gave Mr. Newbury or what conversation you had with Mr. Newbury there in regard to who was in the office. Will you explain that to the Court, please?

Mr. Hyde: I submit there is not.

The Court: I think it is repetition. I will see what she has to say.

A. I think he said his name was Kief or Keeve. I asked him twice. It must have been a Jewish accent or something, so I had to ask him again what his name was, so I thought maybe I heard it good enough so when I repeated it to Mr. Newbury he would know, so when I said Kief or Keeve over the telephone Mr. Newbury thought I said another name.

Mr. Hyde: I am going to object to that because that is a conclusion.

The Court: Yes, sustained.

A. (By the witness) He thought I said Mr. Kent.

Mr. Hyde: I am going to object to the conclusion she makes as to what the gentleman on the other end of the line thought.

The Court: Yes, I doubt whether I should consider that.

Q. (By the Court) What was the other man's name?

A. Kent, but he didn't repeat the name Kent to me, Mr. Newbury didn't.

Q. (By the Court) You learned about that later?

A. Yes, sir.

172 Mr. Hyde: I renew my objection.

The Court: I think so. The objection will be sustained and that will be stricken.

Mr. Shelton: He was the one that brought out the thought and I wanted to explain it.

Q. (By Mr. Shelton) Did you testify whether or not the man had glasses on and if you did not, did he or not?

A. He did have. I don't remember whether I said it or not but the man I talked with had glasses on.

Q. (By the Court) Do you feel he was this man or is there considerable doubt in your mind?

A. No, sir. I have seen him walk around more this morning than I did in the office but I saw him from the back, and I heard him speak, and I was standing about as close to him as when he was speaking to me, and all he said to me was his name in a very muttering voice with his head down, and his hat pulled down, but I saw him

walk across the room, and he would jerk when he talked to me and he seemed ill at ease in the office which I felt he should because I didn't see that he had any business in there after office hours. I thought he was nervous or ill at ease or something because he paced around. He was jerky. He jerked his necktie and his clothes when
173 he talked to me. I was very ill at ease because I had a right to be there and I didn't think he did and I saw him walk across in the other office and there was three doors open.

Q. (By the Court) You understand your testimony might be very important to this defendant?

A. Yes, sir.

Q. Are you taking that into consideration?

A. I certainly am. I don't take it lightly at all.

Q. You understand what it might mean?

A. Yes, sir.

(Witness excused.)

Mr. Shelton: That is all.

Mr. Hyde: May I make my record?

The Court: The same objection and it will be overruled at this time.

Mr. Hyde: May I renew my demurrer in order to save time?

The Court: Yes, the demurrer is again interposed at this time. I am not satisfied yet as to the admissibility of these instruments and I am still considering it. I am not satisfied as to the law. As to the facts I am reasonably well satisfied so I think possibly I had better pass this so I will have sufficient time to go over those cases again. Do you have any objection?

174 Mr. Hyde: No. We rest.

(Thereupon, the trial of the above cause was concluded.)

Certificate.

175 I, B. R. Simpson, hereby certify that I am the regular designated court reporter for the United States District Court for the Western District of Oklahoma; that I reported in shorthand the proceedings had in the above and foregoing entitled cause; and that the foregoing pages are a true and complete transcript of my shorthand notes taken of said proceedings.

B. R. Simpson, Court Reporter,
United States District Court.

Stipulation of Correctness of Bill of Exceptions.

176 It is hereby stipulated and agreed by and between the parties that the foregoing bill of exceptions, together with the original exhibits heretofore ordered by the Court to be transmitted to the Circuit Court of Appeals with the record herein, is correct in every particular and that it may be duly signed, settled and allowed by the Honorable Stephen Chandler, Judge.

Dated this 28th day of March, 1945.

Charles E. Dierker, United States District Attorney,
By Robt. E. Shelton, Assistant U. S. District Attorney.
Herbert K. Hyde,
Lee Williams,
Attorneys for Defendant.

Endorsed: Filed in District Court on March 28, 1945.

Order Allowing Bill of Exceptions.

177 At Oklahoma City, Oklahoma, in said District, on this 28th day of March, 1945, the parties having stipulated that the foregoing bill of exceptions, together with the original exhibits, is correct in every particular, it is now

Ordered that the same be and is hereby settled, allowed, signed and authenticated, as in the proper form and as

conforming to the truth and is the true bill of exceptions herein, and is hereby made a part of the record in this case; and, it is

Further Ordered that the original exhibits introduced in evidence upon the motion to suppress evidence and upon the trial of this cause, now in the custody of the Clerk of this Court, shall be deemed to be included as a part of the foregoing bill of exceptions, with the same effect and in all respects as if incorporated in said bill of exceptions, and that said exhibits be transmitted with the record in this cause to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

STEPHEN S. CHANDLER, JR.,
United States District Judge.

Endorsed: Filed in District Court on March 28, 1945.

Clerk's Certificate to Transcript.

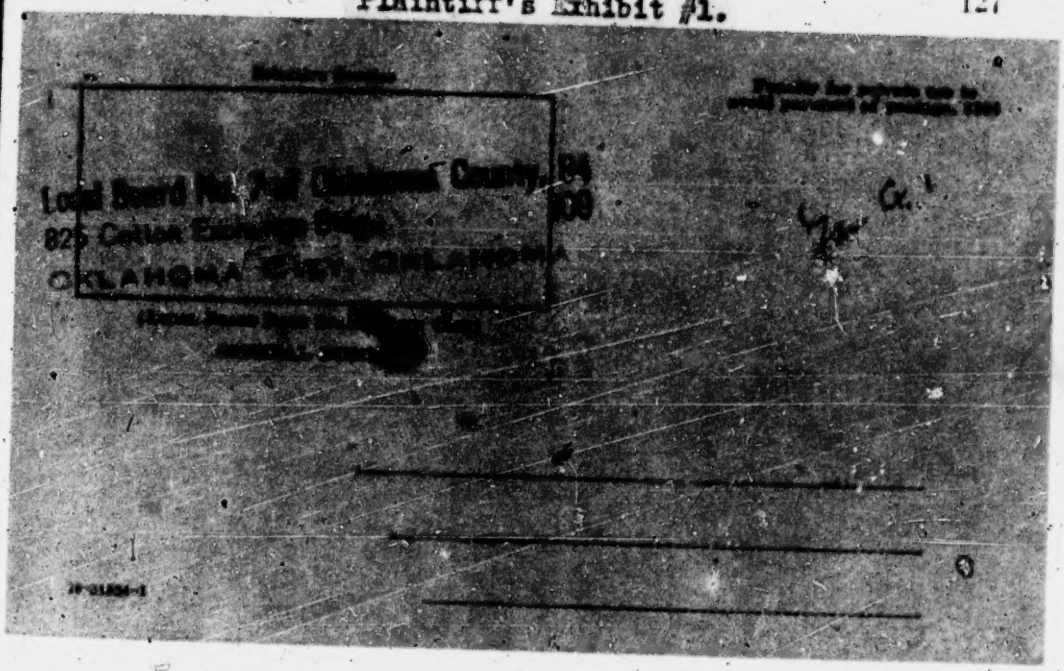
United States of America, Western District of Oklahoma, ss.

180 I, Theodore M. Filson, Clerk of the United States District Court for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in Case No. 14695-Criminal, United States of America, Plaintiff vs. George Harris, Defendant, as full, true and complete as the said transcript purports to contain and as called for in the stipulation for transcript of the record above set forth.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Oklahoma City, in said District this 31st day of March, A. D. 1945.

THEODORE M. FILSON, Clerk,
(Seal) By MARGARET P. BLAIR, Deputy.

Filed April 3, 1945. Robert B. Cartwright, Clerk.


Local Board No. 2 of Oklahoma County, Okla.
825 Cotton Exchange Bldg.
OKLAHOMA CITY, OKLAHOMA

16-31824-1

NOTICE OF RIGHT TO APPEAL

Appeal from classification by local board or board of appeal must be made by signing appeal form on back of Selective Service questionnaire (Form 40) at office of local board, or by filing written notice of appeal, within 10 days after the mailing of this notice.

Before appeal, a registrant may file a written request for appearance within the same 10-day period; and if he does so, the local board will fix a day and notify him to appear personally before the local board. If this is done, the time to appeal is extended to 10 days from the date of mailing of the new Notice of Classification (Form 57) after such appearance.

There is a right in certain dependency cases of appeal from appeal board decision to the President; see Selective Service Regulations. For advice, see your Government appeal agent.

(Cut along this line)

NOTICE OF CLASSIFICATION

App. not Req.

(First name) (Middle name) (Last name)

Order No. ..... has been classified in Class .....

(Until ..... 19.....)
(Insert date for Class I-A and I-A-O only)

by ☐ Local Board.
☐ Board of Appeal (by vote of ..... to .....).
☐ President.

....., 19.....
(Date of mailing) (Member of local board)

The law requires you, subject to heavy penalty for violation, to have this notice, in addition to your Registration Certificate (Form 2), in your personal possession at all times—to exhibit it upon request to authorized officials—to surrender it, upon entering the armed forces, to your commanding officer.

DSS Form 57. (Rev. 11-16-42)

(Cut along this line to detach card)

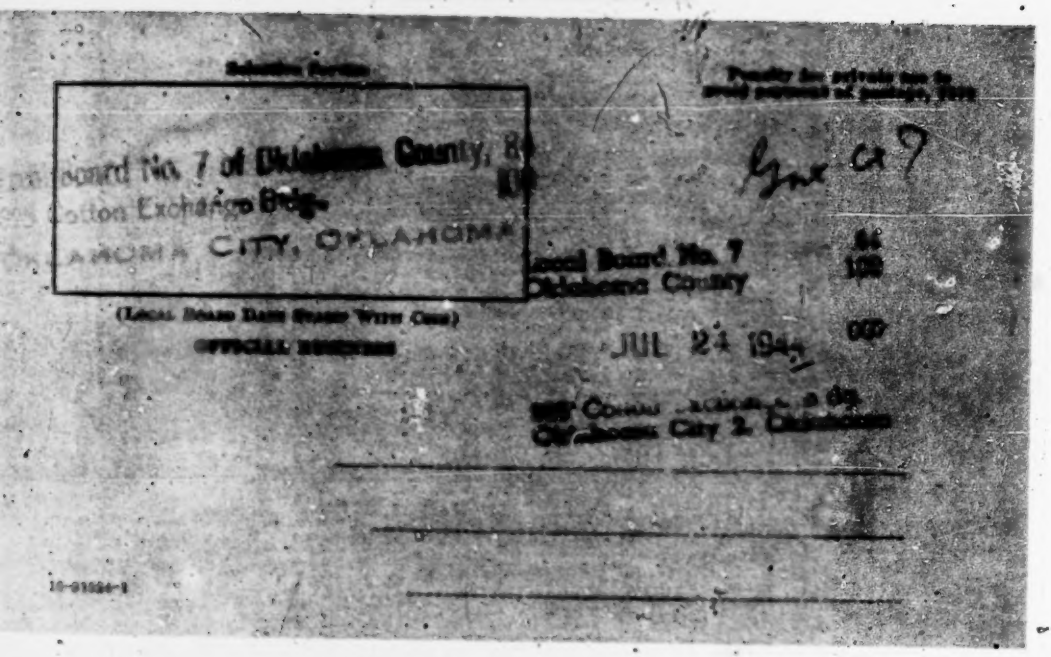
The law requires you—

1. **To keep in touch with your local board.**
2. **To notify it of any change of address.**
3. **To notify it of any fact which might change your classification.**
4. **To comply with the instructions on the notice of classification part of this form.**

GPO 16—31824-1

(Plaintiff's Exhibits 2 to 6, inclusive, are identical with plaintiff's Exhibit 1.)

Plaintiff's Exhibit #7.



(The other side of plaintiff's exhibit 7, "Notice of Classification", is identical with the "Notice of Classification" which appears as part of plaintiff's exhibit 1.)

Plaintiff's Exhibit #8

REGISTRATION CERTIFICATE

This is to certify that in accordance with the Selective Service Proclamation of the President of the United States

(First name) (Middle name) (Last name)

(Place of residence)

(This will be identical with line 2 of the Registration Card)

has been duly registered this ..... day of ....., 19....

(Signature of registrar)

Registrar for Local Board ..... (Number) (City or county) (State)

THE LAW REQUIRES YOU TO HAVE THIS CARD IN YOUR PERSONAL POSSESSION AT ALL TIMES

D. S. S. Form 2
(Revised 6/9/41)

16—21631

(Registrant must sign here)

DESCRIPTION OF REGISTRANT

Race		Height (Approx.)		Weight (Approx.)		Complexion	
		Eyes		Hair		Sallow	
White						Light	
		Blue		Blonde		Ruddy	
Negro		Gray		Red		Dark	
		Hazel		Brown		Freckled	
Oriental		Brown		Black		Light brown	
		Black		Gray		Dark brown	
Indian				Bald		Black	
Filipino							

Other obvious physical characteristics that will aid in identification .....

16—21631

(Government's exhibits 9 to 18, inclusive, are identical with plaintiff's exhibit 8.)

Gx 4/9

Plaintiff's Exhibit #19

incorrect

Local Board No. 7 of Oklahoma County, Okla.
825 Cotton Exchange Bldg. 109
OKLAHOMA CITY, OKLAHOMA

Local Board No. 7 of Oklahoma County, Okla.
825 Cotton Exchange Bldg. 109
OKLAHOMA CITY, OKLAHOMA

correct

Local Board No. 7 64
Oklahoma County 109
OCT 18 1944 007
825 Cotton Exchange Bldg.
Oklahoma City, Oklahoma

[Plaintiff's Exhibit 20.]

[Envelope.]

Murray F. Gibbons
Attorney and Counsellor
Midwest Building
Oklahoma City, Oklahoma

†*George Harris*
Personal Papers

**7/20/44 Taken from 2nd drawer of small bureau—bedroom at 2308 NW Ellison St Oklahoma City. James C. Ware, Special Agt. FBI*

[Plaintiff's Exhibit 21.]

[Small envelope with handwriting in pencil and in ink on face as follows:]

**5-9385*
Norma
†*Cards*
OKay

[Plaintiff's Exhibit 24.]

(Copy)

SF - 50
(Field Appointment)

Selective Service System

State Headquarters for Oklahoma

Notification of Personnel Action

Place: Oklahoma City, Okla.

Date: Sept. 25, 1944

Name Miss Virginia E. McCollum

Nature of Action: War Service Indefinite Appointment

Effective Date: September 21, 1944

†Appears in handwriting in ink on original.
*Appears in handwriting in pencil on original.

	From	To
Position		Clerical Assistant
Salary		$1440 per annum
Bureau or Other Unit		Local Board #7, Oklahoma County
Headquarters		
Departmental or Field	Field	Field

Remarks: Under this appointment you are subject to the provisions of the Civil Service Retirement Act.

Appointment under War Service Regulation V for duration of the war and not to exceed six months thereafter, unless sooner terminated, and subject to a trial period of one year.

The State Director has confirmed the foregoing action with respect to your employment in the Selective Service System. This action is subject to the provisions on the reverse hereof, when applicable.

Robert W. Johnson
(ROBERT W. JOHNSON, Major, F.D.,)
State Personnel Officer
Selective Service System

Employee Notification

[On reverse.]

Important

New appointees must execute Personnel Affidavit, take Oath of Office, and enter upon duty before any payment of salary can be made.

Employees are required to conform to all laws; and to be governed by all rules, regulations, and instructions now in force or hereafter promulgated by the Director of Selective Service or the Civil Service Commission.

The salaries of employees are subject to deduction as specified by law.

A War Service Appointment does not confer a Classified Civil Service Status.

Caution: This notification may not be used as the basis for the assertion of any authority or for the claim of any privilege as a representative of the Selective Service System.

(Copy)

SF - 50
(Field Appointment)

Selective Service System

State Headquarters for Oklahoma.

Notification of Personnel Action

Place: Oklahoma City, Okla.
Date: Sept. 25, 1944

Name: Miss Virginia E. McCollum

Nature of Action: War Service Indefinite Appointment

Effective Date: September 21, 1944

CSC Report Series: P

Civil Service or Other Legal Authority: 9th Reg. CMM Cert. WSF-231-CC(R) 9/16-44

Date of Birth: May 31, 1904

Date and Order No.: 9/25/44 44-42

Appropriation:

	From	To
Position		Clerical Assistant
Salary		$1440 per annum
Bureau or Other Unit		Local Board #7, Oklahoma County
Headquarters		
Departmental or Field	Field	Field

Remarks: Under this appointment you are subject to the provisions of the Civil Service Retirement Act.

Appointment under War Service Regulation V for duration of the war and not to exceed six months thereafter, unless sooner terminated, and subject to a trial period of one year.

The State Director has confirmed the foregoing action with respect to your employment in the Selective Service System. This action is subject to the provisions on the reverse hereof, when applicable.

ROBERT W. JOHNSON, Major, F.D.,
State Personnel Officer
Selective Service System

Personnel Folder (State Headquarters)

[Plaintiff's Exhibit 25.]

(Copy)

Selective Service System

Report of Personnel Action Taken by Local Board or Appeal Board With Respect to Compensated Employee

Local Board No. 7, Okla. County Oklahoma City, Oklahoma
(Name and number of board) (Location)

Sept. 21, 1944
(Date)

To: State Director of Selective Service for Oklahoma
(State)

The following personnel action has been taken with respect to the employee named:

Name of employee: McCollum, Virginia E., Miss
Date of birth: May 31, 1904
Nature of action: Indefinite War Service Appointment
Effective date: September 21, 1944

	From	To
Pay-roll designation		Clerical Assistant
Salary		$1440 per annum

Remarks: Indefinite War Service Appointment under Regulation V, for duration of the war and six months thereafter, unless soon terminated. (Original appointment)

I certify that the above-named employee is necessary for

the proper performance of the duties of this Board in the execution of the Selective Service Law; that the rate of compensation authorized is just and does not exceed that authorized by the State Director of Selective Service; that this employment does not violate the expressed Nepotism Policy of the Selective Service System; and that the employee has accepted the appointment indicated by properly executing Standard Form No. 61, Oath of Office, Affidavit, and Declaration of Appointee. (Note.—This certification does not apply when reporting separations.)

The following-listed forms indicated by cross mark (X) are attached:

[xx] Standard Form No. 57, Application for Federal Employment.
[xx] C. S. Form 2390, Fingerprint Chart.
[xx] C. S. Form 2413, Certificate of Medical Examination.
[xx] Standard Form No. 61, Oath of Office, Affidavit, and Declaration of Appointee.
[ ] Letter of Resignation.
[ ] Form W-4, Employee's Withholding Exemption Certificate, with name of spouse, if any, indicated thereon.

PAUL G. DAGGETT
(Signature of board chairman)

Original and two copies to be forwarded by the Board to the State Director.

Approved (copies returned to the above-named Board):

Robert W. Johnson
ROBERT W. JOHNSON, Major FD
State Personnel Officer
Selective Service System
(For the) State Director.

[Instructions re form omitted.]

[Plaintiff's Exhibit 26.]

(Copy)

Rent Receipt

June 25, 1944

Received of Virginia E. McCollum

Ten and no/100 ..... Dollars for

Rent of Room & Board No. .....

..... Month

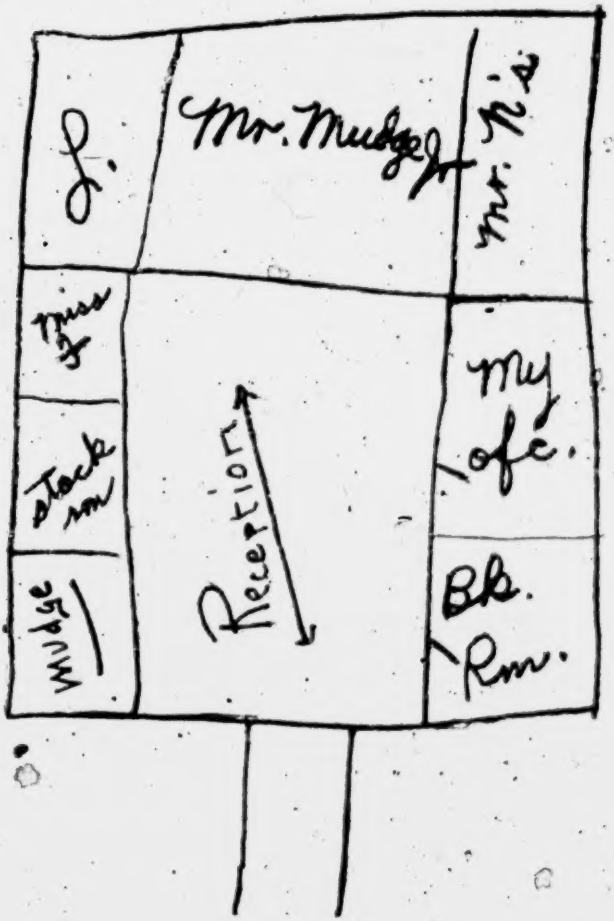
Ending July 2, 1944

$10.00

MRS. MCCAULY

Gn. # 27

Plaintiff's Exhibit #27



[Clerk's Certificate.]

In the United States District Court for the Western District of Oklahoma

I, Theodore M. Filson, Clerk of the United States District Court for the Western District of Oklahoma, do hereby certify the attached and foregoing are plaintiff's original exhibits numbers 1 to 27 inclusive, and an endorsed envelope containing un-numbered exhibits which were identified at the time of trial, as called for in the designation of portions of the record, and as included in the order of this Court directing the Clerk to transmit the original exhibits to the Circuit Court of Appeals for the Tenth Circuit, in Case Number 14695-Criminal, United States of America, Plaintiff vs. George Harris, Defendant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Oklahoma City in said District this 31st day of March, A. D. 1945.

THEODORE M. FILSON, Clerk,
(Seal) By MARGARET P. BLAIR, Deputy.

Filed April 3, 1945. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Order of Submission.

Thirty-second Day, May Term, Monday, July 9th, A. D. 1945. Before Honorable Alfred P. Murrah, Circuit Judge, and Honorable Eugene Rice and Honorable Royce H. Savage, District Judges.

This cause came on to be heard and was argued by counsel, Herbert K. Hyde, Esquire, appearing for appellant, Robert E. Shelton, Esquire, and Charles E. Dierker, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion.

[October 26, 1945.]

Herbert K. Hyde (Lee Williams was with him on the brief) for Appellant.

Robert E. Shelton, Assistant United States Attorney (Charles E. Dierker, United States Attorney, was with him on the brief), for Appellee.

Before MURRAH, Circuit Judge, and RICE and SAVAGE, District Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

This appeal involves the reasonableness of a search and seizure, pursuant to which appellant was indicted, tried and convicted on evidence obtained by such challenged search and seizure.

In execution of two warrants for the arrest of appellant—one duly issued upon a criminal complaint alleging violation of the Mail Fraud Statute (18 U.S.C.A. 338), and the other for violation of the National Stolen Property Act (18 U.S.C.A. 413-419)—four or five special agents of the Federal Bureau of Investigation went to the apartment of appellant at 2308 North Ellison, Oklahoma City, Oklahoma, about 1:30 P. M. where they found appellant, and immedi-

ately placed him under arrest. In connection with the arrest, and for the declared purpose of "looking for two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company * *", and for "any means that might have been used to commit these two crimes, such as burglarly tools, pens or anything that could be used in a confidence game of this type", the agents proceeded to make a "thorough search" of appellant's apartment consisting of a living room, bedroom, kitchen and bathroom.

After searching for about five hours, one of the agents discovered a sealed envelope in a bureau drawer in the bedroom under some underclothes, upon which was written "George Harris, personal papers". This envelope was torn open and inside it was a smaller one which contained eight Notice of Classification cards, DSS Form 57 and eleven Registration Certificates DSS Form 2 stamped Local Board, No. 7, Oklahoma County, 84, 825 Cotton Exchange Building, Oklahoma City, Oklahoma. These cards and certificates had been originally delivered to this Draft Board by the United States Government to be used by such Board in the administration of the Selective Training and Service Act of 1940. The appellant was later charged by an indictment containing nineteen counts for offenses growing out of his unlawful possession of these cards and certificates. After timely motions to quash, suppress and dismiss, a jury having been waived, the case was tried to the court. The cards and certificates were offered and admitted in evidence over appellant's objection, and based upon this evidence the court found appellant guilty of various counts contained in the indictment, and imposed the concurrent sentences from which this appeal is taken.

Admittedly the officers had no search warrant describing the premises searched or the articles seized, and the only asserted authority for the search and seizure was as an incident to and contemporaneously with appellant's lawful arrest within the premises searched. On appeal, appellant contends that the search and seizure was constitutionally unreasonable and the court therefore erred in admitting the seized articles in evidence against him.

The rights of one to be secure in his person, papers and effects, against unreasonable search and seizure, and not to be compelled in a criminal case to be a witness against himself are fundamental rights under the 4th and 5th Amendments to the Constitution "which effect the very essence of constitutional liberty and security". Boyd v. United States, 116 U. S. 616; Weeks v. United States, 232 U. S. 383, 391. The true meaning of these rights are to be derived from what was deemed an unreasonable search and seizure at the time of the adoption of the Amendments to the Constitution,[1] and are to be construed in a manner which, will serve the public interest on the one hand, while protecting and safeguarding the personal rights of individuals on the other. Carrol v. United States, 267 U. S. 132, 149.

In constitutional language, a search and seizure without the authority of a search warrant issued upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the person or things to be seized, is an unreasonable search and seizure and a conviction based upon evidence thus obtained cannot stand. Weeks v. United States, supra; Gouled v. United States, 225 U. S. 298.

We start then with the proposition that general exploratory searches for the purpose of uncovering evidence of crime, or for obtaining information, either with or without a search warrant is unreasonable and therefore within the constitutional ban. Boyd v. United States, supra; Silverthorne Lumber Co. v. United States, 251 U. S. 385; Gouled v. United States, supra; Amos v. United States, 255 U. S. 313. "It has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein". Agnello v. United States, 269 U. S. 20, 32. See also Go Bart Importing Co. v. United States, 282 U. S. 344; United States v. Lefkowitz, 285 U. S. 452; Byars v. United States, 273 U. S. 28. It has, however, always been recognized under English and American law, before and after the 4th Amendment, that when a

[1] Willoughby on the Constitution, Sec. 720, p. 1172. Cooley Constitutional Limitations, 8th Ed. p. 612; Underhill's Criminal Evidence, 4th Ed., Sec. 395, p. 1441.

man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense, may be seized and held as evidence in a prosecution against him.[2]

Thus in Marron v. United States, 275 U. S. 192, the court held that as an incident to a lawful arrest, for a crime committed in their presence, the officers were authorized without a search warrant to contemporaneously search the place where the crime was being committed in order to find and seize the things used to carry on the criminal enterprise; that such authority extended to all parts of the premises used for the unlawful purpose, and included those things so closely related to the criminal enterprise as to be necessary for its maintenance. See also United States v. Lindenfeld, 142 F. 2d 829 and United States v. Jack Davis, ——F. 2d ——; Matthews v. Correa, 135 F. 2d 534; United States v. Poller, 43 F 2d 911. And, in the Agnello case, supra, the court, while sustaining the search of the place where the arrest was made, as reasonable incident thereto, held that the right did not extend to other places and that the search of Agnello's house several blocks distance from where he was arrested could not be sustained as reasonable incident to his arrest. By the same rationale, it has been held that a "clean sweep of all the papers and documents found" on the premises where the arrest was made was not reasonably incident to the lawful arrest, as all general exploratory searches in the hope that evidence of crime might be found. Silverthorne Lumber Company v. United States, 251 U. S. 385; Go-Bart Importing Co. v. United States, 282 U. S. 344; United States v. Lefkowitz, 285 U. S. 452.

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[2]Carrol v. United States, 267 U.S. 132; Boyd v. United States, 116 U.S. 616; Weeks v. United States, 232 U.S. 383; Aguello v. United States, 269 U.S. 20; Marron v. United States, 275 U.S. 192; United States v. Jack Davis, decided August 8, 1945, —— F. 2d ——; United States v. Lindenfeld, 142 F. 2d 829; Matthews v. Correa, 135 F. 2d 534; United States v. Tot, 131 F. 2d 261; United States v. Poller, 43 F. 2d 911; United States v. Welsh, 247 F. 299; Welsh v. United States, 267 F. 819; Colyer v. Skeffington, 265 F. 17; United States v. Murphy, 264 F. 842; Flagg v. United States, 233 F. 481; United States v. Hart, 241 F. 655; United States v. Mills, 185 F. 318; United States v. Wilson, 163 F. 338, appeal dismissed 220 U.S. 549. See also Concerning Searches and Seizures, 34 Harvard Law Review, 361; Underhill's Criminal Evidence, Sec. 799, 4th Ed., p. 1455; and 47 Amer. Juris. Search and Seizure, Sec. 19. See also Annotation 82 A.L.R. 782.

It is significant that all cases which deal with the authority to search and seize incident to a lawful arrest make a clear distinction between general and exploratory searches made solely to find evidence of guilt and those searches to find and seize the instrumentalities or the fruits of the crime for which the arrest is made. See also, Boyd v. United States, 116 U. S. 616; Weeks v. United States, 232 U. S. 383; Carroll v. United States, 267 U. S. 132; Gouled v. United States, 255 U. S. 298; Agnello v. United States, supra.

"The line between the fruits of the crime itself and mere evidence thereof may be narrow" and perhaps turn more on the good faith of the search than the actual distinction between "fruits" and "evidence". Matthews v. Correa, supra. It cannot be doubted that a search for the fruits or the means of a crime, either under authority of a valid search warrant or as an incident to a lawful arrest, may exceed the bounds of constitutional reasonableness, and our province is to determine whether the officers have exceeded the legitimate prerogatives conferred by the warrant regardless of the object of their quest. See Matthews v. Correa, supra; United States v. Lindenfeld, supra; In re Ginsberg, 147 F. 2d 729. The query in either case is whether the search has exceeded the bounds of reasonableness.

Appellant bases his contentions of unreasonableness on the thesis that the search was general, exploratory and evidentiary, but the record does not support this contention. The officers did not enter to explore to see what they could find. They entered to execute a valid warrant of arrest. The incidental and contemporaneous search was thorough—it was as thorough as its nature required, but the reasonableness of a search is not necessarily to be judged by its thoroughness, so long as it has a reasonable relationship to its object. Appellant was arrested for offenses involving the forgery of a $25,000 check drawn on the Mudge Oil Company and signed by designated officers, and the testimony in this case is to the effect that the officers were looking for two $10,000 cancelled checks which had been stolen from the offices of the Mudge Oil Company, and which the officers had good reason to believe had been used as a part of the

means for forging the $25,000 check. The avowed purpose of the search was for the means by which the crime was committed and it extended no further and was no more extensive than necessary to uncover the articles sought. It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot, and it is not unlikely or unreasonable to assume that they would be found encased in an envelope where the draft cards and certificates were in fact discovered.

To be sure, the authority to search for the fruits or the means of the offense as an incident to the lawful arrest, like all prerogatives based on reason, is susceptible to oppressive abuse. The authority must be confined to narrow limits and utmost good faith exacted. Courts must exercise care lest we unwittingly sanction an evidential exploration under the guise of a declared legitimate purpose. The restraint can best be imposed by an inquiry into the bona fides of the declared purposes of the search and the trial court is the first and best judge of whether the challenged search was reasonably incident to its permissible purposes.

When the search was challenged in this case, the trial court conducted an extensive inquiry concerning its purposes and scope, and based upon all of the evidence concluded that the search and seizure was not unreasonable. While it is also our duty to exercise circumspection for the constitutional rights of the one accused of crime, we must accord to the trial court the primary responsibility of balancing orderly and efficient enforcement of the criminal laws against the constitutional rights of those charged with crime. When judged by these standards, we are unable to say that the search for the fruits and means of the crime charged as an incident to the lawful arrest therefor was unreasonable under the attendant circumstances.

But, conceding the authority of the officers to search as they did for the instruments or fruits of the crime for which appellant was arrested, the further question is posed whether the officers were authorized to seize the instruments of a crime for which appellant was not arrested and which were wholly unrelated to the crime charged. In other words, conceding the validity of the search, was the seizure never-

theless bad. If the officers had been in under a search warrant sufficiently describing the premises to be searched but which did not describe or particularize the articles seized, the seizure would be unauthorized and the seized articles would be inadmissible, for the requirement that a search warrant particularly describe the things to be seized, "prevents the seizure of one thing under a warrant describing another". Marron v. United States, 275 U. S. 192.

It is said that the authority to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant is no greater than that conferred by a search warrant issued upon adequate proof sufficiently describing the premises and the things sought to be seized. United States v. Lefkowitz, supra; Papani v. United States, 84 F. 2d 160; United States v. Thomson, 113 F. 2d 643; United States v. Kirschenblatt, 16 F. 2d 202. "Indeed, * * security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime". United States v. Lefkowitz, supra. From this premise it may be argued that seizures incidental to lawful arrest should be limited to the instrumentalities and fruits of the crime for which the arrest is made. But, we must not permit the technical rules of logic so blindly lead us to an absurd result. "We are not to strain an immunity to a point at which human nature rebels against honoring it in human conduct". (Judge Cardozo in People v. Chaigles, 237 N.Y. 193, 142 N.E. 583, 32 A. L. R. 676.)

It is important to consider that the function of a search warrant is to authorize the search of one's home before any arrest is made and it is therefore prudent to confine the seizure to the things specified therein—such is the constitutional command, while a search as an incident to a lawful arrest is for the purpose of seizing the fruits or the means of committing the crime, and by its nature necessarily cannot be particularized. To illustrate, in the Marron case, supra, the seizure was unauthorized by the search warrant under which the officers legally entered, but it was sustained as an incident to the lawful arrest.

While a search in violation of the constitution is not made lawful by what it brings to light, Byars v. United States, 273 U. S. 28, 29, neither is a search which is valid in its inception made unlawful merely because it uncovers evidence of a crime not contemplated by such search. Gouled v. United States, 255 U. S. 298, 311, 312; Matthews v. Correa, supra; Shelton v. United States, 50 F. 2d 405; United States v. Kirschenblatt, supra; United States v. Charles, 8 F. 2d 302; Milan v. United States, 296 F. 629. "The important thing is that the search which turns up the offense must itself have been legal", Matthews v. Correa, supra. The articles involved here were uncovered in the course of a lawful search and they were themselves "the means of committing" a crime against the United States.

It would indeed be a flouting of the law to hold that officers while legally searching as an incident to a lawful arrest could not seize the instruments or the means of committing another and wholly unrelated offense unexpectedly uncovered by such search, simply because they did not enter for that purpose. In our judgment, the immunity does not extend that far.

The judgment is affirmed.

Judgment.

Twenty-fourth Day, September Term, Friday, October 26th, A. D. 1945. Before Honorable Alfred P. Murrah, Circuit Judge, and Honorable Eugene Rice and Honorable Royce H. Savage, District Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that George Harris, appellant, surrender himself to the custody of the United States Marshal for the Western District of Oklahoma, in

execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Petition for Rehearing.

Appellant, George Harris, respectfully prays the Court to grant a rehearing herein, for the reasons hereinafter set forth.

In its opinion herein, the Court cites with approval the Boyd, Weeks, Silverthorne, Gouled, Amos, Go-Bart, Byars, Marron, and Lefkowitz Cases decided by the Supreme Court, and states some of the basic principles announced by those cases.

But we submit that the Court has not followed those principles when, as we understand the opinion of the Court, the Court seems to hold, first, that this search was "reasonable."

The Court announces the reason for holding that it was reasonable to be because,

"... The officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest."

and, having entered for *that* purpose, that they had a right to make a thorough search of the premises, even to the extent of ransacking four separate rooms; and, accordingly, the Court holds that the search was "reasonable" because it was "in good faith."

Yet, if the arrest of the appellant Harris was the avowed object, purpose and intent of the officers in entering his home, and none other, then they had completed their mission when they seized the person and the body of the defendant and had him handcuffed.

Did these officers stop at that? No. They say, in effect, "Now that we have the defendant Harris in our custody legally, we intend to make a thorough search of his home for a definite and specific purpose—"looking for two $10,000 cancelled checks of the Mudge Oil Company which our

investigation established had been stolen from the offices of the Mudge Oil Company."

If this be so, and if they were "in good faith", why did not these same officers go before a magistrate, a United States Commissioner or a Federal Judge, and make an affidavit and lay before him the evidence that they claimed to possess, and, based upon that, have issued to them a search warrant covering the identical things for which they were looking?

We judge the good faith of men by their actions and their conduct. This Court says they were in good faith. If they were in good faith, we ask this Court why it is that no indictment has ever been returned against the accused for the alleged violation of law for which he was "legally" arrested? This Court can and will take into consideration, as a matter of judicial knowledge, all of the Court filings in every judicial district in this Tenth Circuit. And in determining the "good faith" of officers in making the arrest in the first instance, this Court ought to inquire why it is that the Government has never indicted this man upon the evidence they claim to have had in their possession at the time he was arrested?

Since no indictment, trial or conviction has been had upon that alleged offense for which he was arrested, then is it unreasonable for us to ask the Court to consider the thorough search which was made as a basis for our argument on the proposition that at the time of the arrest for the alleged crime, the officers were searching in every nook and corner, making "a general and exploratory search", with the hope and purpose in mind that they *might* be able to find something in connection with an alleged violation of law, if not this crime, then some other crime, anything, in order to bring this defendant to justice?

If the avowed object and purpose of the officers was merely to execute a valid warrant of arrest, then we ask the Court why the officers detailed a special squad to guard the defendant while two of them left in the middle of the afternoon and went back to the office of the United States Commissioner and there procured a search warrant to

search his automobile, after they had completely ransacked his home?

Again, if they were "in good faith," we ask the Court why, in obtaining a search warrant for appellant's automobile in order to search it for the same things they were searching his home for, their affidavit for such search warrant merely stated that they had "good cause to believe, and do believe" that George Harris had these things in his possession at that place, without telling the Commissioner anything at all upon which they based that belief? Why did they not say to that Commissioner, as they now say to this Court, "Our investigation establishes two $10,000 cancelled checks have been stolen from the offices of the Mudge Oil Company"? And why did they not tell that Commissioner what *facts* they had upon which to base their "belief" that George Harris had those checks either at his home or in his automobile? Did they have any *facts?* Were they "in good faith", or were they merely on a "fishing expedition"?

The answer to all these questions must be, to any reasonable mind, that their object and purpose was to further their search for "evidence" of some violation of some law.

And we say that all of the actions and conduct and demeanor of the officers is the very antithesis of good faith, and wholly contrary to the purpose and intent of the Fourth Amendment, and a clear invasion of his rights as a citizen in violation of the Fourth and Fifth Amendments.

But, counsel for appellant do not concede that good-faith on the part of the officers is a proper criterion for this Court, for the reason that, as our Courts have said, time and time again, you cannot substitute the socalled good faith of an officer for the necessary deliberate determination of magistrates empowered to issue warrants as to the extent to which he shall go in making a search. Lefkowitz Case).

This Court announces the rule that incident to a valid arrest the officers may make a search as thorough as its nature required; that the reasonableness thereof is not

necessarily to be judged by its thoroughness, so long as it has a reasonable relationship to its object.

Bearing in mind, now, that the object and purpose of the officers is to arrest the person of the defendant, and that no search was contemplated, because no search warrant was obtained to search the home, we therefore are reduced to the position of determining whether or not we are going to make the extent of the search dependent, not upon the arrest, but upon the object of the search, namely, in looking for evidence.

"The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest *certainly is not greater* than that conferred by a search warrant *issued upon adequate proof.*" (Lefkowitz Case).

If the officers say, as they do, that they were looking for two $10,000 cancelled checks which had been stolen from the Mudge Oil Company and which they believed had been used as the basis for forging the $25,000 check, then they knew, or should have known, the numbers on those checks, the dates on which they were issued and cashed, the bank on which they were drawn, the date on which they were issued, and the names of the payees of those checks. And if, in addition to this information they actually did "have good cause to believe" that George Harris had those checks, they might very well, based upon the evidence they had in their possession, have made an affidavit in which they would reveal that information to the magistrate and upon his judicial determination that their information was sufficient to justify their "belief", i.e., that they were "in good faith," and thus secured a search warrant which would have given them the right to make a search as thorough as its nature required, and then this Court might well have said that the search was reasonable for the obvious reason that it had a reasonable relationship to its subject. But they have *not even yet* given that information upon which they claim to have based their belief, their "good faith", either to any magistrate, or to this Court.

And for this Court to attempt to draw a fine line of distinction between the object of a search incident to a lawful

arrest without a search warrant, and a search made under a search warrant, by announcing that regardless of how thorough the search may be, so long as it relates to the things for which the officers were searching, destroys the very foundation upon which this Amendment was built, and is in direct violation of the plain injunction of the Supreme Court of the United States in every decision since the days of John Marshall.

The Court announces in its opinion,

"that, when a man is legally arrested for an offense, whatever is found upon his person, *or in his control* which is unlawful for him to have, and which may be used to prove *the offense*, may be seized and held as evidence in a prosecution against him."

An examination of the cases cited in support of this proposition does not seem to support the conclusion reached thereunder in this case when applied to the facts.

It is true that this statement just above quoted is made in the same language in the Carroll case; but there the Court did not have under consideration a case in which it was claimed there had first been a legal arrest, and therefore the Court unfortunately omitted to include the word "immediate" in the phrase "in his control" in its statement of the principle.

We think the Court is not justified in using the Carroll case as authority for the search in this case; for the Court very emphatically calls attention in that case to the fact that a very different rule must necessarily apply in the case of a moving vehicle which can be quickly removed before a search warrant could be procured, and the case of a search of a store, dwelling house or other structure.

This Court, in its opinion in Pearson v. U.S., No. 3122, decided June 21, 1945, concurred in by the writer of the opinion in the present case, this Court cited and quoted from the Carroll case and also from Director General v. Kastenbaum, 263 U.S. 25, 68 L. ed. 146, 44 Sup. Ct. 52, on the question of "probable cause" or "good faith:"

"But, as we have seen, *good faith is not enough* to con-

stitute probable cause. That faith must be grounded *on facts* within knowledge of the Director General's agent, which, in the *judgment of the court*, would make his faith reasonable."

Further, in the Kastenbaum case, it is said:

"The burden is on the defendant (Government) to establish probable cause for the arrest (search). The want of probable cause, certainly *in the absence of proof of guilt or conviction* of the plaintiff (defendant), is measured by the state of the defendant's (officer's) *knowledge, not by his intent*. It means the absence of probable cause known to the defendant (officer) when he instituted the suit (search). But the standard applied to defendant's (the officer's) consciousness is external to it. The question is not whether *he* thought the facts to constitute probable cause, but *whether the court thinks they did*."

Can this Court say *that this Court thinks*, from the *facts* and *knowledge* then possessed by these officers and which has now been revealed to this Court, constituted probable cause—that they were in good faith? What were and are those facts and that information? They say to this Court: "Our investigation established two $10,000 cancelled checks had been stolen from the offices of the Madge Oil Company." "That is what *we* thought." "Therefore, without more, we made this search in good faith." Have they *proven to this Court* that there were ever at any time *any* checks stolen from the Mudge Oil Company? No. Have they said to this Court anything whatsoever as to why, if they did, *they* believed George Harris ever had any such checks? No. They have shown *nothing* to this Court to justify probable cause, belief, or good faith.

As authority for the statement in the Carroll case which is embodied in the opinion in this case, the Court cites the Weeks case, as does this Court; but the Weeks case does not go so far, but merely recognizes the right "to search *the person* of the accused when legally arrested," and refuses to sanction the search of one place under a lawful arrest at another. This is likewise true of the Agnello case, cited.

The Marron case can furnish no justification for the search

here made. For, as is suggested in the Go-Bart case, in commenting on the Marron case, these officers in searching the home of George Harris did not "see conspiracy being committed;" George Harris was not "committing crime in their presence when arrested;" but, contrary to the situation in the Marron case in which the "things were *visible* and accessible and in the offender's *immediate* custody," the things here were discovered only by a "general search and rummaging" of Harris' home.

In the Lindenfeld case (CCA 2) 142 F.2d.829, the things seized were cards containing patient's records, within reach of his desk, upon the lawful arrest of a physician in his office for violation of the narcotic laws; and the Court there comments on the fact that "there was no exhaustive and minute combing of the premises as in the Go-Bart and Lefkowitz cases," but, being within easy reach of his desk in his office where he conducted his unlawful enterprise, they were in his "*immediate* possession and control."

In Matthews v. Correa, 135 F.2d.534, upon petitioner being arrested in her home for concealing property from her trustee in bankruptcy, a search was made and certain articles were found and seized, which the Court says were "the very things withheld." The Court calls attention to the fact that in U.S. v. Poller, 2d.Cr., 43 F.2d.911 (which this Court also cites), it was suggested that under the then decisions the limitations were only "upon the fruits to be gathered" and that these would "tend to limit the quest itself." This is apparently about the same thing this Court is now suggesting. However, in the cited case, the Court says that,

"Possibly, however, the law now goes further and *limits the manner of search*. At any rate, the Lefkowitz and Go-Bart cases emphasized that in the Marron case the articles seized were *visible* and accessible and in the offender's *immediate* custody."

In U.S. v. Tot (CCA 2) 131 F.2d.261, the thing taken upon an arrest of defendant was a *gun*. Not only did Tot tell the officers that he had a gun, but told them where it was, and its taking was "practically a contemporaneous transaction" with the arrest. And it was held properly seized only by

reason of the fact that it came within the well-established exception of being "a weapon which might be used to effect an escape."

The Poller case, supra, not only does not support the decision herein, but holds that the things which may be seized upon a lawful arrest is,

"limited to those used to commit or carry on the offense for which the arrest is made."

The decision in U.S. v. Welsh (DC NY) 247 F.239, plainly cannot stand, in view of the Byars case. For Welsh was arrested without a warrant, and there is no justification shown for the arrest in the first instance; and when the Court says that,

"anyone could arrest the person carrying it, who was thus committing a felony *in his presence*. To be sure, the man making the arrest *would not know that a felony was being committed*. - - - But in this case it appears - - that the *suspicions were well founded*."

it, in effect, says that,

"a search prosecuted in violation of the Constitution *is* made lawful by what it brings to light."

And this the Byars case says cannot be true.

The same applies to the case of Welsh v. U.S. (CCA 2) 267 F.819, involving the same arrest and search.

Neither does the case of Colyer v. Skeffington (DC Mass) 265 F.17, support the decision here. In that case the Court, in a habeas corpus hearing for 20 aliens held for deportation as being members of the Communist Party, approves the principles of the Weeks and Silverthorne cases, and comments on the fact that "there were probably no search warrants and that none could have been legally issued."

In U.S. v. Murphy (DC NY) 264 F.842, Murphy was arrested for being drunk, and whiskey was seized "from his person". The case can have no application here.

In Flagg v. U.S., 233 F.481, cited in the Colyer case, supra, and cited by this Court, defendant was arrested without a

warrant, and without a search warrant certain books were seized and made the basis for his later arrest by Federal officers and his conviction for using the mails to defraud. The case was reversed because of the *unlawful* seizure.

In U. S. v. Hart, 214 F.655, the things involved were *voluntarily* delivered by Hart to the U. S. Attorney, and the Court says that, "on the statement of Hart himself, there has been no search and no seizure."

In U.S. v. Mills (DC NY) 185 F.318, the seizure of documents concerning another similar offense to that on which defendant was lawfully arrested, was held improper.

The decision in U.S. v. Wilson (DC NY) 163 F. 338, which involved things taken from a trunk afterwards opened with a key taken *from the person* of defendant when arrested turns upon the meaning of the terms "compulsory discovery" and "seizure", which the Court holds to

"refer to more than the exercise of compulsion upon the defendant himself, either during the trial, or while he is under arrest, to compel him to produce, or to furnish information as to, property and papers which are wanted as evidence."

In refusing to return the seized items before the trial, the Court reserved to the defendant the right to object to their introduction in evidence at the trial on Constitutional grounds.

This Court says in its opinion, on page 4, that,

"In constitutional language, a search and seizure without the authority of a search warrant issued upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the person or things to be seized, is an unreasonable search and seizure, and a conviction based upon evidence thus obtained cannot stand.",

citing the Weeks and Gouled cases. We thoroughly agree with this pronouncement. Yet we ask, how can the Court reconcile with the foregoing principle its conclusion that the seizure here involved was "reasonable", in view of the Lefkowitz case which says that "authority to search contem-

poraneously with a lawful arrest certainly is not greater than that conferred by a search warrant."

Again, this Court says, (opinion, p.11)

"It is important to consider that the function of a search warrant is to authorize the search of one's home *before any arrest* is made and it is therefore *prudent to confine the seizure to the things specified therein*—such is the constitutional command, while a search as an incident to a lawful arrest is for the purpose of seizing the fruits or the means of committing the crime, and *by its nature necessarily cannot be particularized.*"

Why, we ask, would it be an easier, or any more prudent, before an arrest, to particularize the things to be searched for, than it would after the matter had progressed to an extent that a lawful warrant of arrest could be procured? Would the officers desiring to search likely know more as to the items and their location before the matter had reached the stage where they would be justified in seeking a warrant of arrest, than they would after it reached that stage?

This Court reaches the further conclusion that, conceding the lawfulness of the search, the seizure of and prosecution based upon other items not connected with the crime for which defendant was arrested, is good. In support of this conclusion the Gouled and Matthews cases, supra, and the Shelton, Kirschenblatt, Charles and Milam cases, infra.

As to the Gouled case, it should be borne in mind that the articles seized were the *same* items described in the search warrant, and were "particularly described" in it.

We have discussed the Matthews case, supra.

In Shelton v. U.S. (CCA 7), 50 F.2d.405, defendant was arrested upon information which was held sufficient to justify his arrest without a warrant, that information being, in effect, that he was a busy bootlegger, and that he was about to convey a load of liquor to his home; upon his arrest, no liquor was found on his person, nor in his car, but some was found and seized from his garage. The liquor was in his *immediate* control, within easy reach, and certainly it related to the very object of the arrest.

The Kirschenblatt case (CCA 2) 16 F.2d.202, was noted in our original brief, and holds the very reverse of the holding of this Court on this proposition.

In the Charles case (DC Cal.) 8 F.2d.302, defendant was lawfully arrested for violation of narcotic laws; upon a search some liquor was found, some of which was "in plain view." The Court attempts, unsuccessfully, to distinguish U.S. v. Boyd (DC Wash.) 1 F.2d. 1019, which holds exactly the opposite, saying,

"It may be conceded that a narcotic or other Federal officer, who on reasonable grounds institutes a search for drugs, may not take advantage of his presence on the entered premises to make a search for liquor. To hold otherwise would in effect be to qualify section 25 of title 2 of the National Prohibition Act by evasion, and to encourage unconstitutional subterfuge."

and the Court comments that "there is very little authority for or against this proposition", and cites in support of it only one, Milan v. U.S. (CCA 4) 296 F.629, which is also cited by this Court.

In fact, the Milam case seems to be about the only case which does support this proposition; while there are quite a number to the contrary, most of which were cited by us in our original brief, and being:

U.S. v. Mills, supra;

U.S. v. Kirschenblatt, supra;

U.S. v. Poller, supra;

U.S. v. Brengle (DC Va.) 29 F.Supp.190;

U.S. v. Boyd, supra;

U.S. v. Moore, (DC Me.) 4 F.2d.600;

Cofer v. U.S. (CCA 5) 37 F.2d.577;

This Court, of course, having said that this search was legal, concedes that as being true in holding it permissible to seize articles connected with another offense not contemplated by the search. This it must do, else it would be confronted with Amos v. U.S., 255 U.S.313, 65 L.ed.654, 41

Sup.Ct.266, holding such seizure unlawful where the search is unlawful.

But we cannot concede this search to have been lawful.

The whole matter narrows down to this:

1. These officers, they say, wanted to search Harris' home and car for two $10,000 cancelled checks.

2. They knew they could not secure a *valid* warrant to search for them, because they had no probable cause which they could present to a magistrate as a basis for their "belief" that they were there.

3. So, as a subterfuge, they secured what purported to be a valid warrant of arrest, based upon complaint which, while positive in form, likewise had no probable cause for its issuance, else Harris would have been indicted on that very charge thereafter.

4. Then, using this socalled valid warrant of arrest, and having entered his home under it, they proceeded to do that for which they could not have secured a valid search warrant.

Is that "good faith?"

Is that a "reasonable" search?

Were these officers justified in "combing and rummaging" Harris' home under these facts?

We assert:

That a careful analysis of the decisions of the Supreme Court and of every Circuit Court in the Nation, sustains the proposition that a thorough search of a man's home can only be upheld by the issuance of a search warrant based upon probable cause supported by oath or affirmation;

That no agent of the Government can substitute his suspicions for the judgment of a magistrate;

That under a warrant of arrest no agent of the Government has any authority to extend his search beyond the person of the defendant and the things which are immediately in the presence of the defendant;

That at that point, no officer or agent of the Government

can extend his search through the bathrooms, the kitchens, the bedrooms, under the mattresses, in the closets, through bureau drawers, and into sealed envelopes, under the guise, as in this case, of looking for evidence of two cancelled checks of the Mudge Oil Company;

That such a search, even though it be related to the alleged means by which the crime was committed, might reasonably expected to be hidden away, and accordingly related to the offense for which the defendant was arrested, cannot be sustained upon that proposition, for the reason that it is a clear invasion of the Constitution and the Amendments thereto.

At the risk of tedious repetition, if the Court's holding in this case be the law, then the Court has opened the door of opportunity for every officer and agent of the Government to by-pass all committing magistrates and all Courts, and you have impliedly said to these men: It is not necessary for you to make an affidavit before you get a search warrant to search a man's home; it is not necessary for you to have probable cause to believe that a crime is being committed in a certain home; all you need to do is to get a warrant for his arrest on any pretext you may devise, arm yourself with the warrant for his arrest only, wait until he gets into his home (and, of course he can't be in all the rooms at the same time, but wherever you may catch him), put your handcuffs on him, hold him in that room for five, six, or seven hours, make your search in every nick and crevass of his home, over his objections notwithstanding, as long as the object of your search is reasonably related to the crime for which you have arrested him, and it matters not if you find anything connected with the crime, if you should by chance find anything in that house concealed or hidden away relating to any crime, State or Federal, just bring it on in and the Courts will see that he goes to the penitentiary; if he should be so unfortunate as to have in his possession a gallon of corn whiskey which had been given to him for fish bait by one of the boys down in the Kiamiche Mountains, bring it on in even though you find it on the top shelf of his pantry in the kitchen, even though it is unrelated to the unlawful possession of two allegedly stolen Mudge Oil Company checks for which you are holding the man under arrest; if you find a counterfeit

bill, in a sealed envelope, which he may have found on the streets that same day, secreted in a sealed envelope in the suit which he wore that day, and which was hanging in his locked closet, take the door off the hinge, search the suit, break open the sealed envelope, get the counterfeit bill which was found by the defendant, and we can still put him in the penitentiary, and do this even though it is wholly unrelated to the two stolen Mudge Oil Company checks which you were looking for and did not find, and for which he was not indicted or tried.

We again assert that this cannot be the law in America.

We reiterate that a search in violation of the Constitution is not made lawful by what it brings to light.

We do not disagree with many of the splendid principles of law announced by this Court, which are sustained by the decisions of all the Circuits and of the Supreme Court.

But the conclusions of the Court in placing its stamp of approval upon the extent of a search as is done in this case, without a search warrant, is in direct violation of the very principles so announced, and as laid down by the Supreme Court of the United States.

Conclusion.

We therefore respectfully submit that the Court having arrived at erroneous conclusions in its decision, should grant a rehearing herein, upon which the search and the seizure here involved should be held to be unreasonable and in violation of the Fourth and Fifth Amendments to the Constitution, and this cause reversed and remanded with directions to dismiss the same.

Respectfully submitted,

HERBERT K. HYDE,
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406 Perrine Building, Oklahoma City, Oklahoma, Attorneys for Appellants.

November, 1945.

Filed November 5, 1945. Robert B. Cartwright, Clerk.

Order Denying Petition for Rehearing.

Eleventh Day, November Term, Wednesday, November 28, A. D. 1945. Before Honorable Alfred P. Murrah, Circuit Judge, and Honorable Eugene Rice and Honorable Royce H. Savage, District Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

Order Staying Mandate.

Thirteenth Day, November Term, Friday, November 30th, A. D. 1945. Before Honorable Orie L. Phillips, Circuit Judge.

This cause came on to be heard on the application of appellant for a stay of the mandate herein.

On consideration whereof, it is now here ordered that said application be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and

proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3105, wherein George Harris was appellant, and United States of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 10th day of December, A. D. 1945.

(Seal, U. S. Circuit Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

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In the
Supreme Court of the United States

October Term, 1945

No. [redacted] 34

GEORGE HARRIS, PETITIONER,

VERSUS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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DECEMBER, 1945.

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In the
Supreme Court of the United States
October Term, 1945

No.

GEORGE HARRIS, PETITIONER,

VERSUS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION FOR A WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of George Harris, petitioner, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

"In execution of two warrants for the arrest of petitioner one duly issued upon a criminal complaint alleging viola-

tion of the Mail Fraud Statute (18 U.S.C.A. 338) and the other for violation of the National Stolen Property Act (18 U.S.C.A. 413-419)—five special agents of the Federal Bureau of Investigation went to the apartment of petitioner in Oklahoma City, Oklahoma, about 1:30 p. m., where they found appellant, and immediately placed him under arrest. In connection with the arrest, and for the declared purpose of 'looking for two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company * * *' and for 'any means that might have been used to commit these two crimes, such as burglary tools, pens or anything that could be used in a confidence game of this type,' the agents proceeded to make a 'thorough search' of appellant's apartment consisting of a living room, bedroom, kitchen and bathroom" (Opinion, R. 145-146).

"After searching for about five hours, one of the agents discovered a sealed envelope in a bureau drawer in the bedroom under some underclothes, upon which was written, 'George Harris, personal papers.' This envelope was torn open and inside it was a smaller one which contained eight Notice of Classification cards, DSS Form 57, and eleven Registration Certificates, DSS Form 2, stamped 'Local Board No. 7, Oklahoma County, 84, 825 Cotton Exchange Building, Oklahoma City, Oklahoma.' * * * Petitioner was later charged by an indictment in the District Court for the Western District of Oklahoma containing nineteen counts for offenses growing out of his alleged unlawful possession of these cards

and certificates. After timely motions to quash, suppress and dismiss, a jury having been waived, the case was tried to the Court. The cards and certificates were offered and admitted in evidence over petitioner's objection, and based upon this evidence, the Court found petitioner guilty of various counts contained in the indictment, and imposed concurrent sentences of five years on each of sixteen counts" (Opinion, R. 146).

"Admittedly the officers had no search warrant describing the premises searched or the articles seized, and the only asserted authority for the search and seizure was as an incident to and contemporaneously with petitioner's lawful arrest within the premises searched" (Opinion, R. 146).

B.

Basis of Jurisdiction of This Court

Petitioner appealed from the judgment and sentence of the District Court of the United States for the Western District of Oklahoma to the Circuit Court of Appeals for the Tenth Circuit, and that court rendered judgment affirming the District Court on October 26, 1945 (R. 152).

The opinion of the Circuit Court of Appeals (R. 145) is reported in — Fed.(2d) —.

Petition for rehearing was filed by petitioner (R. 153), and was denied by the Circuit Court of Appeals on November 28, 1945 (R. 167).

This petition for writ of *certiorari* is filed within thirty (30) days after the entry of the judgment of the Circuit Court

of Appeals denying petition for rehearing, as required by Rule 11 of the Rules of Criminal Procedure of this Court promulgated May 7, 1934.

Jurisdiction is conferred upon this Court by Title 28, Sec. 347(a), U.S.C.A. (Jud. Code, Sec. 240, as amended) to require by *certiorari* that said cause be certified to this Court by the Circuit Court of Appeals for the Tenth Circuit for determination by this Court.

C.

Questions Presented

1. Whether as an incident to a lawful arrest an unlimited, ransacking search may be made of the home of the person arrested for the purpose of discovering and seizing evidences of guilt of crime.

2. Whether when a man is legally arrested the officer may search for and seize everything in his control which it is unlawful for him to have, or may only search for and seize whatever is found upon his person and in his immediate control.

3. Whether so-called good faith of officers in making a search of premises incident to a lawful arrest may be substituted for the probable cause necessary in order to make a search reasonable.

4. Whether evidence seized upon a search of premises claimed to be incident to a lawful arrest therein may be used against the person arrested upon his prosecution for an offense other than that for which he was then arrested, which

offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search.

D.

Reasons Relied on for the Allowance of the Writ

1. The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decisions of this Court, particularly the decisions in *Boyd* v. *United States*, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. 524, holding a search for a man's private papers to be used as evidence against him to be unreasonable and in violation of the Fourth and Fifth Amendments to the Constitution of the United States; in *Weeks* v. *United States*, 232 U.S. 383, 58 L. ed. 652, 34 Sup. Ct. 341, holding envelopes found in the drawer of a chiffonier upon a search for additional testimony to support the charge against the accused could not be used against him; in *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385, 64 L. ed. 319, 40 Sup. Ct. 182, holding papers seized upon a clean sweep of accused's office could not be made the basis of a new indictment based upon the knowledge thus obtained; in *Gouled* v. *United States*, 255 U.S. 298, 65 L. ed. 647, 41 Sup. Ct. 261, holding that even a search warrant may not be used as a means of gaining access to a man's house or papers for the purpose of making search to secure evidence to be used against him in a criminal proceeding; and in *Byars* v. *United States*, 273 U.S. 28, 71 L. ed. 520, 47 Sup. Ct. 248, holding that a search prosecuted in violation of the Constitution is

not made lawful by what it brings to light; and in *Marron* v. *United States*, 275 U.S. 192, 72 L. ed. 231, 48 Sup. Ct. 74, holding that general searches violate fundamental rights and that the Constitutional requirement prevents the seizure of one thing under a warrant describing another; and in *Go-Bart Importing Company* v. *United States*, 282 U.S. 344, 75 L. ed. 374, holding an unlimited search and ransacking of desk, safe, filing cases and other parts of an office to be a lawless invasion and a general exploratory search in the hope that evidence of crime might be found, and therefore unreasonable; and in *United States* v. *Lefkowitz*, 285 U.S. 452, 76 L. ed. 877, holding a search of desks, cabinet and baskets in defendant's office and the seizure of books, papers and other articles taken from them, as an incident of a lawful arrest under a warrant, and which were wanted solely for use as evidence of crime, to be unreasonable and in violation of defendant's Constitutional rights; and in *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. 266, holding a motion to suppress as evidence contraband and illicitly distilled blockade whiskey seized upon an illegal search of a private home should have been sustained.

It is also in conflict with the decision of this Court in *Director General* v. *Kastenbaum*, 263 U.S. 25, 68 L. ed. 146, 44 Sup. Ct. 52, holding that good faith is not enough to constitute probable cause.

2. The decision of the Circuit Court of Appeals for the Tenth Circuit is also in conflict with the decisions of the Circuit Courts of Appeals for the Second, Fourth, Fifth,

Sixth, Seventh and Ninth Circuits; and particularly the decisions in *Veeder* v. *United States* (C.C.A. 7th), 252 Fed. 414, holding papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure even under a search warrant; in *Wakkuri* v. *United States* (C.C.A. 6th), 67 Fed. (2d) 844, holding any search of a private dwelling without a search warrant is at least *prima facie* unreasonable, and that that which might not be done with the only kind of search warrant that could be obtained—an invalid one—should not be permitted without any warrant at all; in *Papain* v. *United States* (C.C.A. 9th), 84 Fed.(2d) 160, holding that a lawful arrest does not enlarge the right to search a dwelling house, but merely serves the function of a search warrant; in *United States* v. *Thompson* (C.C.A. 7th), 113 Fed.(2d) 643, 129 A.L.R. 1291, holding the right to search without a search warrant in connection with an arrest is no greater than when the search is made pursuant to a search warrant; in *United States* v. *Kirchenblatt* (C.C.A. 2d), 16 Fed.(2d) 202, holding the right to search the premises of one lawfully arrested thereon does not extend to indiscriminate seizure of incriminating documents beyond those which are part of the forbidden act for which he is arrested; in *United States* v. *Poller* (C.C.A. 2d), 43 Fed.(2d) 911, holding that the power of officers making an arrest to search for and seize papers of the person arrested is limited to those used to commit or carry on the offense for which the arrest is made; in *Cofer* v. *United States* (C.C.A. 5th), 37 Fed.(2d) 577, holding shells seized in

execution of search warrant for intoxicating liquors could not be used in evidence in prosecution for conspiracy to deter witness by force, although shells resembled those found in place where witness was murdered; in *Honeycutt* v. *United States* (C.C.A. 4th), 277 Fed. 929, holding stolen goods seized upon search warrants held to be invalid could not be used in evidence in prosecution for buying, receiving and having in possession articles stolen from an interstate shipment; in *Lawson* v. *United States* (C.C.A. Ill.), 9 Fed.(2d) 746, holding to the same effect; and in *Takahashi* v. *United States* (C.C.A. 9th), 143 Fed.(2d) 118, holding that where a search is justifiable and legal for the purpose of obtaining the instrumentalities of the commission of a particular crime, the seizure of evidence that an entirely different crime may have been committed is not justified by the circumscribed authority for the legal search.

3. The question involved in this case as to whether evidence seized upon a search of premises claimed to be incident to a lawful arrest therein may be used against the person arrested upon his prosecution for an offense other than that for which he was then arrested, which offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search, is one of Federal law, under the Constitution of the United States and Amendments thereto, which has not been, but should be, settled by this Court.

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 3105, George Harris, Appellant, v. United States of America, Appellee;" and that said judgment of the said United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

GEORGE HARRIS,
Petitioner;

HERBERT K. HYDE,
Attorney for Petitioner.

In the
Supreme Court of the United States
October Term, 1945

No.

GEORGE HARRIS, PETITIONER,

VERSUS

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions

No opinion was rendered by the United States District Court. The judgment was by Stephen S. Chandler, Jr., United States District Judge (R. 36-37).

The opinion of the Circuit Court of Appeals for the Tenth Circuit (Murrah, Circuit Judge, and Rice and Savage, District Judges; written by Judge Murrah) was rendered October 26, 1945, and is found beginning at Page 145 of the record, and is reported in — Fed.(2d) —.

II.

Jurisdiction

Jurisdiction of this Court to grant *certiorari* is invoked under Title 28, Sec. 347(a) U.S.C.A. (Jud. Code, Sec. 240, as amended), and is shown in the Petition at Page 4.

III.

Statement of Case

Five special agents of the Federal Bureau of Investigation went to petitioner's home in Oklahoma City and arrested him upon two warrants (R. 62, 65), one of which (R. 24) charged petitioner with having sent a letter through the mails in connection with the execution of a scheme to defraud by negotiation and cashing of a certain false, forged and fictitious check for the sum of $25,000, drawn on the Mudge Oil Company; and the other (R. 27) charging petitioner with having caused the same check to be transported in interstate commerce. They immediately handcuffed petitioner, and from 1:30 to 6:30 p. m. made "a thorough examination of the premises" consisting of four rooms, lifting up the mattresses and carpets, and "the search was as thorough as we could make it" (R. 70). One of the officers testified (R. 65) that "We were looking for two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company," and (R. 66) that "We were searching for any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a con-

fidence game of this type." He further testified that he was searching in the home of petitioner for the same things for which he later obtained a search warrant to search petitioner's automobile (R. 68), and in his application for this search warrant he stated he wanted to search for "monies unlawfully obtained, checks of the Mudge Oil Company and other forms of checks and other paraphernalia and instrumentalities used in the perpetration of what is commonly known as 'confidence game,' or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books * * *." Another of the officers testified (R. 77), that "I was searching for anything which may have been the means through perpetrating any of the charges alleged in the complaints," and (R. 78), "It is my understanding that we were searching for two blank checks and also searching for writing materials, burglar tools or anything of that nature which may have been used in perpetrating the crimes alleged, charged."

These statements of the officers show conclusively that they were not actually looking for the means by which the crimes alleged had been committed, but that they were looking merely for evidence of the commission of those or some other crimes.

The officer who found the cards and certificates involved testified that he found them (R. 77) "in the second drawer in his bureau. * * * The cards were inside a small envelope, inside of the outside envelope, and it was sealed there;" that there were also some green cards in the small envelope; that

the envelope was found at the bottom under some underclothes (R. 78); that the drawer was closed, and he opened it; that they were hidden from his view until he removed the clothing; and that he broke the seal to the outside envelope (R. 86), on which was written, in the handwriting of petitioner, the words, "George Harris, Personal Papers" (R. 85 and 86, Exhibits 20 and 21, R. 135).

IV.

Specification of Errors

The evidence upon which the indictment, and each and every count thereof, was based, and upon which the judgment of conviction on each and every count was based, was obtained by an unreasonable and unlawful search and seizure in violation of the rights of the petitioner under the Fourth and Fifth Amendments to the Constitution of the United States; by reason whereof, the trial court erred in overruling the motion of petitioner to suppress evidence (R. 18), his motion to quash the indictment (R. 33), his demurrer to the indictment (R. 33), and erred in admitting the evidence so seized.

V.

Summary of Argument

POINT A. The unlimited, ransacking search of petitioner's home as an incident to his lawful arrest for the purpose of discovering and seizing evidence of his guilt of crime, was unreasonable, and in violation of his rights under the Fourth

and Fifth Amendments to the Constitution of the United States.

POINT B. Upon lawful arrest of a man, the officer may not search for and seize everything in his control which it is unlawful for him to have, but only whatever is found upon his person and in his immediate control.

POINT C. The officers had no probable cause for making such a search of petitioner's home, and their so-called good faith cannot be substituted therefor so as to make their search reasonable.

POINT D. The evidence seized upon such search cannot be used as evidence against petitioner upon his prosecution for an alleged offense other than that for which he was then arrested, which offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search.

VI.

ARGUMENT

Point A

The unlimited, ransacking search of petitioner's home as an incident to his lawful arrest for the purpose of discovering and seizing evidence of his guilt of crime, was unreasonable, and in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

And the Fifth Amendment provides:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The intimate relation between these Amendments was pointed out by this Court in *Boyd* v. *United States*, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. 524, holding that they were both violated by the seizure of a man's private papers for the purpose of using them in evidence against him in a criminal case; and the principles laid down in that case have been followed without variance by this Court whenever the question of searches or seizures has been brought before it.

The principles in that and later cases by this Court are likewise recognized as controlling in the opinion by the Circuit Court of Appeals in this case, when it says (R. 147):

"We start then with the proposition that general exploratory searches for the purpose of uncovering evidence of crime, or for obtaining information, either with or without a search warrant is unreasonable and therefore within the Constitutional ban. *Boyd* v. *United States*, *supra*; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Gouled* v. *United States*, 225 U.S. 298; *Amos* v. *United States*, 255 U.S. 313."

And when it says further (R. 148) that:

"A clean sweep of all the papers and documents found on the premises where the arrest was made was not reasonably incident to the lawful arrest, as all general

exploratory searches in the hope that evidence of crime might be found, are unreasonable. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Go-Bart Importing Company* v. *United States*, 282 U.S. 344; *United States* v. *Lefkowitz*, 285 U.S. 452."

But the Court seeks to evade those principles when it announces that its reason for holding the search and seizure in this case to be reasonable, is (R. 149):

"* * * The officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest."

Yet if the arrest of petitioner was the avowed object, purpose and intent of the officers in entering his home, and none other, then they had completed their mission when they seized the person and the body of petitioner and had him handcuffed.

It is significant that petitioner has never been indicted for either of the alleged offenses for which he was arrested. This being so, is it unreasonable for us to ask this Court to consider the thorough search which was made as a basis for our argument that at the time of the arrest the officers were searching in every nook and corner, making a "general and exploratory search," with the hope and purpose in mind that they might be able to find something in connection with an alleged violation of law, if not the crime for which he was arrested, then some other crime, anything, in order to convict this petitioner of some crime?

If the avowed object and purpose of the officers was merely to execute a valid warrant of arrest, then we ask why

the officers detailed a special squad to guard the petitioner while two of them left in the middle of the afternoon and went back to the office of the United States Commissioner and there procured a search warrant to search his automobile, after they had completely ransacked his home? And why was it that that search warrant was procured upon an affidavit made merely "upon information and belief"? That affidavit (R. 28-30), made by Agent Melvin, the leader of the squad of officers who made this search, states that "he has good cause to believe, and does believe that George Harris * * * has in his possession * * * checks of the Mudge Oil Company and other forms of checks, etc.," without stating one single fact upon which he based that belief. Such an affidavit this Court has held to be bad if tested by the Fourth Amendment. *Byars* v. *United States*, 273 U.S. 28, 71 L. ed. 520, 47 Sup. Ct. 248.

In *Gouled* v. *United States*, 255 U.S. 298, 65 L. ed. 647, 41 Sup. Ct. 261, this Court held that, as a result of the *Boyd* and *Weeks* cases, even a search warrant—

> "* * * may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceedings,"

and further holding, of the papers for which the search was made in that case, similar to the papers for which these officers were searching in this case, that:

> "The government could desire its possession only to use it as evidence against the accused, and to search for and seize it for such purpose was unlawful."

The facts in *Go-Bart Importing Co.* v. *United States*, *supra*, were very similar to those in this case. There a prohibition agent, with a warrant for the arrest of defendants, went to the offices of the company, arrested two of the defendants, and by threat of force compelled one of them to open a desk and safe, searched them and took papers from them, and searched other parts of the office and took other papers; of which this Court said:

> "It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found."

Another similar case is *United States* v. *Lefkowitz*, 285 U.S. 452, 76 L. ed. 877, in which this Court reviews many of the earlier cases starting with the *Boyd* case, *supra*. There, four prohibition agents, with a warrant of arrest for defendant, but without a search warrant, went to his office and arrested him, and thereupon searched and took from the person of defendant various papers, opened all the drawers of both desks in the room and also a towel cabinet, examined their contents, and took therefrom and carried away books, papers and other articles; of which this Court said:

> "* * * Save as given by that warrant (of arrest) and as lawfully incident to its execution, the officers had no authority over respondent or anything in the room. * * * (They) assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense * * * Their conduct was unrestrained."

And further held that the authority of officers to search one's house contemporaneously with his lawful arrest therein upon a valid warrant of arrest—

> "* * * certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests."

The facts do not justify any inference that these officers had any probable cause to search petitioner's home for those things for which they said they were searching.

Would any member of this Court have felt justified in issuing to these officers a search warrant to search his home based upon the suspicions, beliefs and surmises which they had? If they had told a member of this Court that they "believed" that petitioner might have had in his home "two $10,000 cancelled checks of the Mudge Oil Company," which might afford evidence that he was connected with sending this alleged $25,000 forged check through the mails and in interstate commerce, without telling you any more facts to justify that belief than they told the United States Commissioner in the affidavit for search warrant (R. 28-30) to search his automobile for the same purpose, would a search warrant have been given to them for that purpose? Manifestly not.

The search warrant for the automobile was void on its face. It is to be supposed that if they had applied for a search

warrant to search petitioner's home at the same time they secured the warrants for his arrest, it would likewise have been bad on its face. How much more power, then, did these agents have as a claimed incident to the arrest?

In *Wakkuri* v. *United States* (C.C.A. 6th), 67 Fed.(2d) 844, it is said:

> "Any search of a private dwelling without a search warrant is at least *prima facie* unreasonable. *Agnello* v. *U. S.*, 269 U.S. 20, 70 L. ed. 145, 46 Sup. Ct. 4. * * * That which might not be done with the only kind of search warrant that could be obtained—an invalid one—should not be permitted without any warrant at all."

And, in *Papain* v. *United States*, (C.C.A. 9th), 84 Fed. (2d) 160:

> "That a lawful arrest is made does not enlarge the right to search a dwelling house or to seize articles therein, as the arrest merely serves the function of a search warrant."

And, in *United States* v. *Thompson* (C.C.A. 7th), 113 Fed.(2d) 643, 129 A.L.R. 1291:

> "The right to search without a search warrant in connection with an arrest is no greater than when the search is made pursuant to a search warrant."

Point B

Upon lawful arrest of a man, the officer may not search for and seize every thing in his control which it is unlawful for him to have, but only whatever is found upon his person and in his immediate control.

The Circuit Court of Appeals in its opinion (R. 147-148) asserts:

> "* * * that when a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense, may be seized and held as evidence in a prosecution against him."

An examination of the cases cited in support of this proposition does not seem to support the conclusion reached thereunder in this case when applied to the facts, but shows that the proposition is stated too broadly.

It is true that this statement just quoted is made in the same language in *Carroll* v. *United States*, 267 U.S. 132, 69 L. ed. 543, 39 A. L. R. 790; but there the Court did not have under consideration a case in which it was claimed there had first been a legal arrest, and therefore the Court seems to have unfortunately omitted to include the word "immediate" in the phrase used, "in his control."

We think the Court is not justified in using the *Carroll* case as authority for the search in this case, in any event; for this Court very emphatically calls attention in that case to the fact that a very different rule must necessarily apply in the case of a moving vehicle which can be quickly removed before a search warrant could be procured, and the case of a search of a store, dwelling house or other structure.

As authority for the statement in the *Carroll* case, *supra*, this Court in that case, as does the Circuit Court in its opinion in this case, cited the case of *Weeks* v. *United States*, 232 U.S. 383, 58 L. ed. 652, 34 Sup. Ct. 341; but the *Weeks* case does not go so far, but merely recognizes the right "to search the person of the accused when legally arrested," and refuses

to sanction the search of one place under a lawful arrest at another. This is likewise true of *Agnello* v. *United States*, 269 U.S. 20, 70 L. ed. 145.

The *Marron* case can furnish no justification for the search here made. For, as is suggested in the *Go-Bart* case, in commenting on the *Marron* case, these officers in searching the home of George Harris did not "see conspiracy being committed;" George Harris was not "committing crime in their presence when arrested:" but, contrary to the situation in the *Marron* case in which the "things were *visible* and accessible and in the offender's *immediate* custody," the things here were discovered only by a "general search and rummaging" of Harris' home.

In the *Lindenfeld* case (C.C.A. 2d), 142 Fed.(2d) 829, the things seized were cards containing patient's records, within reach of his desk, upon the lawful arrest of a physician in his office for violation of the narcotics laws; and the Court there comments on the fact that "there was no exhaustive and minute combing of the premises as in the *Go-Bart* and *Lefkowitz* cases," but, being within easy reach of his desk in his office where he conducted his unlawful enterprise, they were in his "*immediate* possession and control."

In *Matthews* v. *Correa*, 135 Fed. (2d) 534, upon petitioner being arrested in her home for concealing property from her trustee in bankruptcy, a search was made and certain articles were found and seized, which the Court says were "the very things withheld." The Court calls attention to the fact that in *U. S.* v. *Poller* (2d Cr.), 43 Fed. (2d) 911 (which this Court

also cites), it was suggested that under the then decisions the limitations were only "upon the fruits to be gathered" and that these would "tend to limit the quest itself." This is apparently about the same thing this Court is now suggesting. However, in the cited case, the Court says:

> "Possibly, however, the law now goes further and *limits the manner of search*. At any rate, the *Lefkowitz* and *Go-Bart* cases emphasized that in the *Marron* case the articles seized were *visible* and accessible and in the offender's *immediate* custody."

In *U. S.* v. *Tot* (C.C.A. 2d), 131 Fed.(2d) 261, the thing taken upon an arrest of defendant was a *gun*. Not only did Tot tell the officers that he had a gun, but told them where it was, and its taking was "practically a contemporaneous transaction" with the arrest. And it was held properly seized only by reason of the fact that it came within the well established exception of being "a weapon which might be used to effect an escape."

The *Poller* case, *supra*, not only does not support the decision herein, but holds that the things which may be seized upon a lawful arrest are—

> "* * * limited to those used to commit or carry on the offense for which the arrest is made."

The decision in *U. S.* v. *Welsh* (D.C., N.Y.), 247 Fed. 239, plainly cannot stand, in view of the *Byars* case. For Welsh was arrested without a warrant, and there is no justification shown for the arrest in the first instance; and when the Court says that—

"anyone could arrest the person carrying it, who was thus committing a felony *in his presence*. To be sure, the man making the arrest *would not know that a felony was being committed.* * * * But in this case it appears * * * that the *suspicions were well founded,*"

it, in effect, says that:

"a search prosecuted in violation of the Constitution *is* made lawful by what it brings to light."

And this the *Byars* case says cannot be true.

The same applies to the case of *Welsh* v. *U. S.* (C.C.A. 2d), 267 Fed. 819, involving the same arrest and search.

Neither does the case of *Colyer* v. *Skeffington* (D.C., Mass.), 265 Fed. 17, support the decision here. In that case the Court, in a *habeas corpus* hearing for twenty aliens held for deportation as being members of the Communist party, approves the principles of the *Weeks* and *Silverthorne* cases, and comments on the fact that "there were probably no search warrants and that none could have been legally issued."

In *U. S.* v. *Murphy* (D.C., N.Y.), 264 Fed. 842, Murphy was arrested for being drunk; and whiskey was seized "from his person." The case can have no application here.

In *Flagg* v. *U. S.*, 233 Fed. 481, cited in the *Colyer* case, *supra*, and cited by this Court, defendant was arrested without a warrant and without a search warrant certain books were seized and made the basis for his later arrest by Federal officers and his conviction for using the mails to defraud. The case was reversed because of the *unlawful* seizure.

In *U. S.* v. *Hart*, 214 Fed. 655, the things involved were *voluntarily* delivered by Hart to the U. S. Attorney, and the

Court says that, "on the statement of Hart himself, there has been no search and no seizure."

In *U. S.* v. *Mills* (D.C., N.Y.), 185 Fed. 318, the seizure of documents concerning another similar offense to that on which defendant was lawfully arrested, was held improper.

The decision in *U. S.* v. *Wilson* (D.C., N.Y.), 163 Fed. 338, which involved things taken from a trunk afterwards opened with a key taken *from the person* of defendant when arrested, turns upon the meaning of the terms "compulsory discovery" and "seizure;" which the Court holds to—

> "refer to more than the exercise of compulsion upon the defendant himself, either during the trial, or while he is under arrest, to compel him to produce, or to furnish information as to, property and papers which are wanted as evidence."

In refusing to return the seized items before the trial, the Court reserved to the defendant the right to object to their introduction in evidence at the trial on Constitutional grounds.

We therefore submit that the principle can only be correctly stated by changing it to read—

> "that when a man is legally arrested for an offense, whatever is found upon his person or in his *immediate* control which is unlawful for him to have and which may be used to prove the offense for which he is then arrested, may be seized and held as evidence in a prosecution against him for that offense."

Point C

The officers had no probable cause for making such a search of petitioner's home, and their so-called good faith

cannot be substituted therefor so as to make their search reasonable.

The Circuit Court of Appeals in its opinion attempts to differentiate and justify the search made in this case from those made in the *Lefkowitz*, *Go-Bart* and other cases cited, *supra*, on the ground of "good faith." It says (R. 150):

> "The authority (to search) must be confined to narrow limits and utmost good faith exacted. Courts must exercise care lest we unwittingly sanction an evidential exploration under the guise of a declared legitimate purpose. The restraint can best be imposed by an inquiry into the *bona fides* of the declared purposes of the search."

Yet that same court, in its opinion in *Pearson* v. *U. S.*, 150 Fed.(2d) 219, concurred in by the writer of the opinion in the present case, cited and quoted from *Director General* v. *Kastenbaum*, 263 U.S. 25, 68 L. ed. 146, 44 Sup. Ct. 52, on the question of probable cause and good faith, the language of which latter case may be paraphrased as follows:

> "But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the agent, which, in the judgment of the court, would make his faith reasonable. * * * The burden is on the (Government) to establish probable cause for the (search). The want of probable cause, certainly in the absence of proof of guilt or conviction of the (defendant), is measured by the state of the (officer's) knowledge, not by his intent. It means the absence of probable cause known to the (officer) when he instituted the (search). But the standard applied to (the officer's) consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did."

Would this Court say that the facts and knowledge which these officers disclosed to the United States Commissioner in obtaining a search warrant to search petitioner's automobile following their search of his home and their failure to find any evidences of guilt of crime, constituted probable cause, or even showed them to be in good faith? They say to this Court: "Our investigation established two $10,000 cancelled checks had been stolen from the offices of the Mudge Oil Company; we are not going to tell you the facts, but that is what we thought; therefore, without more, we made this search in good faith."

In *Veeder* v. *United States* (C.C.A. 7th), 252 Fed. 414, it is said:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts, * * *. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser.
>
> "No search warrant should be broader than the justifying basis of facts. * * *"

Point D

The evidence seized upon such search cannot be used as evidence against petitioner upon his prosecution for an alleged offense other than that for which he was then arrested, which offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search.

The Circuit Court of Appeals, having already held this search to have been legal, assumes this as a premise in further holding (R. 150 *et seq.*) that the evidence seized may be used to prosecute petitioner for a wholly unrelated crime. It must assume this premise, else it would be immediately confronted with the holding of this Court in *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. 266, in which it was held to be error to overrule a motion to suppress as evidence certain illicitly distilled blockade whiskey seized upon a search which it held to be unlawful in its beginning. It would also be confronted with *Byars* v. *United States*, 273 U.S. 28, 71 L. ed. 520, 47 Sup. Ct. 248, wherein this Court pointed out that:

> "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light."

We do not concede this search to have been legal in any respect. However, assuming that it had been legally begun, we still insist that the seizure was illegal, and that the articles seized could not lawfully be used as evidence against the petitioner.

In *United States* v. *Kirchenblatt* (C.C.A 2d), 16 Fed.(2d) 202, which has been cited and approved by this Court in a number of cases, particularly in the *Go-Bart* case, *supra*, it is said:

> "The right to search the premises of one lawfully arrested thereon for unlawful possession of intoxicating liquor does not extend to the indiscriminate seizure of incriminating documents beyond those which are part of the forbidden act.

"* * * After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate"

And in *United States* v. *Poller* (C.C.A. 2d), 43 Fed.(2d) 911, it was held:

"The power of officers making an arrest to search for and seize papers of the person arrested is limited to those used to commit or carry on the offense for which the arrest is made."

In *Cofer* v. *United States* (C.C.A. 5th), 37 Fed.(2d) 577, the government was held precluded from using evidence of shells found in executing a search warrant for intoxicating liquors, in a prosecution for conspiracy to deter witness by force, although it was claimed the shells resembled those found in place where witness was murdered.

In support of its conclusion on this point, the Circuit Court of Appeals in its opinion cites *Gouled* v. *United States*, 255 U.S. 298, 311, 312; *Matthews* v. *Correa*, 135 Fed.(2d) 534; *Shelton* v. *United States*, 50 Fed.(2d) 405; *United States* v. *Kirchenblatt*, *supra*; *United States* v. *Charles*, 8 Fed.(2d) 302; and *Milan* v. *United States*, 296 Fed. 629. But we assert that they do not uphold the opinion of the Circuit Court in this case.

Referring to the *Gouled* case, *supra*, the fifth question certified and decided read:

"If, in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be

searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?'"

This Court answered that question in the affirmative, but it is submitted that a proper interpretation of that answer does not uphold the use in evidence against petitioner of the articles here seized in this prosecution. The papers in question in that case were seized under two search warrants, the affidavit for the first charging that they "were used as a means of committing a felony, to wit: as a means for the bribery of a certain officer of the United States," and the affidavit for the second charging that they "relate to and have been used in the commission of a felony, to-wit: a conspiracy to defraud the United States." After the papers were seized a joint indictment was returned charging defendants, in the first count, with "being parties to a conspiracy to defraud the United States," and, in the second count, with "having used the mails to promote a scheme to defraud the United States." It is at once evident that the question certified was for the purpose of having determined whether the papers, if the Court held them to have been lawfully seized, could have been used in evidence on the charge of illegal use of the mails, that crime not having been mentioned in the affidavits or search warrants. Bearing in mind, then, that this Court has already held the papers to have been unlawfully seized, let us examine the reasoning used in answering the above question in the affirmative:

"It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid warrant, when thus lawfully obtained by the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law; and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence."

The requirements of the Fourth Amendment for a "valid search warrant" are that—

"* * * no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The question assumes, therefore, as does the answer, that the search warrant "particularly described the things to be seized;" that the affidavit for such search warrant showed probable cause that "they" (the things to be seized) had been or were being used to violate some law; and that after the things so "particularly described" had been so lawfully seized, it was found that "they" constituted relevant evidence also as to some other crime which had not been previously charged, either by indictment or in the affidavit for search warrant. This is far from saying that some other

things not so particularly described in the warrant could have been seized and used as the basis for the prosecution for some other crime wholly unrelated to the object of the search.

A recent case from the Circuit Court of Appeals for the Ninth Circuit illustrates this difference: *Takahashi* v. *United States*, 143 Fed.(2d) 118. In that case, which relies on the *Boyd*, *Gouled*, *Silverthorne* and *Lefkowitz* cases, *supra*, for authority, the right of Government agents to search two American-born Japanese for contraband goods which they were apparently attempting to smuggle was upheld; but it was held that this gave them no right to seize, to attempt to use in evidence, private papers tending to show falsification of application for export license or conspiracy to falsify such application; the court saying:

> "It was conceded that there was reasonable ground for the search.
>
> "But the authority to search cannot be confused with the authority to seize. It cannot be confused with the power to use seized articles in evidence. The Fourth Amendment prohibits unreasonable searches and seizures. The distinction has never been more carefully drawn than in the language used by Mr. Justice Miller in the concurring opinion in the case of *Boyd* v. *U. S.*, *supra*. It is there said:
>
> "'The searches meant by the Constitution were such as led to seizures when the search was successful.'
>
> "And again: 'The things here forbidden are two: search and seizure.'
>
> "It may be laid down as a principle that where a search is justifiable and legal for the purposes of obtaining the instrumentalities of the commission of a particular crime, the seizure of evidence that an entirely

different crime may have been committed is not justified by the circumscribed authority for the legal search. Otherwise, a general seizure of documents could be carried out where a valid search warrant could only be issued for limited objectives."

In the *Shelton* case, cited in the opinion, *supra*, defendant was arrested without a warrant under circumstances held sufficient to justify it, he being a busy bootlegger about to convey a load of liquor to his home, and certain liquor within easy reach and in his immediate control was seized.

In the *Charles* case, cited, *supra*, defendant was lawfully arrested for violation of narcotic laws, and upon a search some liquor was found, some of which was in plain view. The Court in that case attempts, unsuccessfully, to distinguish *United States* v. *Boyd* (D.C., Wash.), 1 Fed.(2d), 1019, which holds exactly the opposite, saying:

"It may be conceded that a narcotic or other Federal officer, who on reasonable grounds institutes a search for drugs, may not take advantage of his presence on the entered premises to make a search for liquor. To hold otherwise would in effect be to qualify Section 25 of Title 2 of the National Prohibition Act by evasion, and to encourage unconstitutional subterfuge."

And comments that "there is very little authority for or against this proposition," citing only one for it, *Milam* v. *United States* (C.C.A. 4th), 296 Fed. 629. The general weight of authority, however, seems to be against the proposition; *U. S.* v. *Kirschenblatt*, *supra*; *U. S.* v. *Poller*, *supra*; *United States* v. *Mills* (D.C., N.Y.), 185 Fed. 318, wherein defendants having been indicted for conspiracy to defraud the United

States of import duties, a warrant for their arrest was issued, under which the marshal seized not only the documents concerning the particular importation, but also all books and papers of defendants' firm covering their business as importers of silks, veilings, laces, etc., and it was:

> "Held: That such seizure was improper, and that the marshal and district attorney would be required to surrender the books and papers so seized, though after examination the district attorney claimed they showed the commission of other offenses which he intended to submit to the grand jury."

United States v. *Brengle* (D.C., Va.), 29 Fed. Supp. 190, a prosecution for violating the white slave traffic act, in which articles and documents seized on a search of premises were suppressed as evidence because not used to commit or carry on the offense charged, wherein the Court discussed the *Marron* and *Lefkowi* cases, *supra*, and says of the *Poller* case, *supra*:

> "Here, it seems to me, the characteristic crisp opinion of Circuit Judge Learned Hand in *United States* v. *Poller* (2d Cr.), 43 Fed. (2d) 911 (decided before the *Lefkowitz* case but after the *Marron* case) is exceedingly helpful. The charge there was 'that Swiss watch movements were being imported in fraud of the customs, manifested as chocolate sweets, and that a case of this sort had been shipped, marked "L.A.B. No. 2".' 43 Fed.(2d) 911. As incident to the lawful arrest of the defendant, the search and seizure were held lawful and reasonable as to documents 'used to commit the offense,' or to carry it on, including papers which bore upon the importation of case 'L.A.B. No. 2,' also described as all those (documents) which were prepared, sent to, or received by Poller, in connection with this very case, 'L.A.B. No. 2,' 43 Fed.(2d) 913. But the Court directed the return of

> all other documents seized, even though these documents might be highly incriminatory as to the defendants and even though they related to similar previous offenses by the defendant, such as 'papers which covered earlier shipments of putative chocolate sweets.' 43 Fed.(2d) 913."

In *United States* v. *Boyd* (D.C., Wash.), 1 Fed.(2d) 1019, a Federal narcotics officer, on detecting the odor of burning opium from defendant's home, was held to have been authorized to search the premises for violation of the Harrison Narcotics Act, only, because his senses gave him probable cause to believe that Act was being violated in his presence, and his seizure of a large quantity of opium was upheld. A large quantity of liquor was also seized, which was made the basis of a separate indictment, and the Court sustained a motion to suppress this liquor as evidence, saying:

> "The seizure of the liquor in the home of the defendant was unlawful."

In *United States* v. *Moore* (D.C., Me.), 4 Fed.(2d) 600, a customs inspector secured a search warrant for intoxicating liquors alleged to have been smuggled into the United States without payment of duties; a search was made and certain liquor was seized, and defendant was indicted for unlawful possession of such liquor under the National Prohibition Act. The Court held the search warrant to have been legally issued under the smuggling statutes, but said:

> "It by no means follows, however, that a search warrant, even when properly issued under the smuggling statute, can be legally used to discover evidence of the commission of the crime of possession of intoxicating liquors.

"It seems a perfectly clear case of a search warrant which was issued for one purpose, i. e., the taking of smuggled goods, being illegally used for a totally different one, i. e., discovery of a violation of a criminal statute, the Volstead Act."

CONCLUSION

The whole matter narrows down to this:

1. These officers, they say, wanted to search Harris' home and car for two $10,000 cancelled checks.

2. They knew they could not secure a *valid* warrant to search for them, because they had no probable cause which they could present to a magistrate as a basis for their "belief" that they were there.

3. So, as a subterfuge, they secured what *purported* to be a valid warrant of arrest, based upon complaint which, while positive in form, likewise had no probable cause for its issuance, else Harris would have been indicted on that very charge thereafter.

4. Then, using this so-called valid warrant of arrest, and having entered his home under it, they proceeded to do that for which they could not have secured a valid search warrant:

Is that "good faith"?

Is that a "reasonable" search?

Were these officers justified in "combing and rummaging" Harris' home under these facts?

We assert:

That a careful analysis of the decisions of the Supreme Court and of every Circuit Court in the nation, sustains the proposition that a thorough search of a man's home can only be upheld by the issuance of a search warrant based upon probable cause supported by oath or affirmation.

That no agent of the Government can substitute his suspicions for the judgment of a magistrate.

That under a warrant of arrest no agent of the Government has any authority to extend his search beyond the person of the defendant and the things which are immediately in the presence of the defendant.

That at that point, no officer or agent of the Government can extend his search through the bathrooms, the kitchens, the bedrooms, under the mattresses, in the closets, through bureau drawers, and into sealed envelopes, under the guise, as in this case, of looking for evidence of two cancelled checks of the Mudge Oil Company.

That such a search, even though it be related to the alleged means by which the crime was committed, might reasonably be expected to be hidden away, and accordingly related to the offense for which the defendant was arrested, cannot be sustained upon that proposition, for the reason that it is a clear invasion of the Constitution and the Amendments thereto.

At the risk of tedious repetition, if the holding of the Circuit Court in this case be the law, then the Court has opened the door of opportunity to every officer and agent

of the Government to by-pass all committing magistrates and all courts, and has impliedly said to these men: "It is not necessary for you to make an affidavit before you get a search warrant to search a man's home; it is not necessary for you to have probable cause to believe that a crime is being committed in a certain home; all you need to do is to get a warrant for his arrest on any pretext you may devise, arm yourself with the warrant for his arrest only, wait until he gets into his home (and, of course he can't be in all the rooms at the same time, but whereever you may catch him), put your handcuffs on him, hold him in that room for five, six or seven hours; make your search in ever niche and crevice of his home, over his objections notwithstanding, as long as the object of your search is reasonably related to the crime for which you have arrested him, and it matters not if you find anything connected with the crime, if you should by chance find anything in that house concealed or hidden away relating to any crime, State or Federal, just bring it on in and the courts will see that he goes to the penitentiary; if he should be so unfortunate as to have in his possession a gallon of corn whiskey which had been given to him for fish bait by one of the boys down in the Kiamichi Mountains, bring it on in even though you find it on the top shelf of his pantry in the kitchen, even though it is unrelated to the unlawful possession of two allegedly stolen Mudge Oil Company checks for which you are holding the man under arrest; if you find a counterfeit bill, in a sealed envelope, which he may have found on the streets that same day, secreted in a sealed en-

velope in the suit which he wore that day, and which was hanging in his locked closet, take the door off the hinge, search the suit, break open the sealed envelope, get the counterfeit bill which was found by the defendant, and we can still put him in the penitentiary, and do this even though it is wholly unrelated to the two stolen Mudge Oil Company checks which you were looking for and did not find, and for which he was not indicted or tried."

We again assert that this cannot be the law in America.

We reiterate that a search in violation of the Constitution is not made lawful by what it brings to light.

We do not disagree with many of the splendid principles of law announced by the Circuit Court of Appeals, which are sustained by the decisions of all the other Circuits and of the Supreme Court.

But the conclusions of the Circuit Court in placing its stamp of approval upon the extent of a search as is done in this case, without a search warrant, is in direct violation of the very principles so announced, and as laid down by the Supreme Court of the United States.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined; and that the judgment of the District Court and of the United States Circuit Court of Appeals for the Tenth Circuit shall be reversed in order that justice may be done to petitioner; and that to such an end a writ of *certiorari*

should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

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DECEMBER, 1945.

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No. 700

In the Supreme Court of the United States

OCTOBER TERM, 1945

GEORGE HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 145–152) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 26, 1945 (R. 152), and a petition for rehearing was denied November 28, 1945 (R. 167). The petition for a writ of certiorari was filed December 28, 1945. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether officers, who have arrested a person in his home in the execution of a valid warrant, may search the house for the instrumentalities of the crime of which the arrested person is accused.

2. Whether the instrumentalities of a wholly unrelated offense, accidentally discovered during such search, may be lawfully seized and used as evidence in a prosecution of the arrested person for such other offense.

3. Whether the search of petitioner's house was conducted in a reasonable manner.

STATEMENT

Petitioner was indicted in the District Court for the Western District of Oklahoma in nineteen counts growing out of his possession of certain cards and certificates alleged to have been stolen from Local Draft Board No. 7 in Oklahoma City. Three counts charged him with stealing, concealing, and retaining with intent to convert to his own use, eight Notice of Classification cards and eleven Registration Certificates, all the prop-

erty of the United States Government, in violation of 18 U. S. C. 100 and 101 (R. 1–3). The next eight counts each charged that he did "falsely make, alter, forge or counterfeit a Notice of Classification card" by stamping it with an incorrect stamp of the draft board, in violation of the Selective Training and Service Act of 1940, 50 U. S. C. App. 311, and Regulation 623.61–2 (R. 1, 3–10). The last eight counts charged that he did "retain in his possession with the intent to utter or publish as true" eight Notice of Classification cards which had been "falsely altered, forged or counterfeited" by being stamped with an incorrect stamp, also in violation of Regulation 623.61–2 (R. 1, 10–16).

Petitioner, alleging that the cards and certificates had been obtained by an illegal search and seizure, filed a timely motion to suppress them as evidence and a petition for their return (R. 18–22); on the same ground he filed a motion to quash the indictment (R. 33). The motions were denied, were renewed at the close of all the evidence at the trial, and were again denied (R. 34–36). Two of the counts involving violations of the Selective Service Regulations were dismissed by the Government, and the court, a jury trial having been waived (R. 34), found petitioner not guilty of stealing the cards as charged in the first count (R. 36). He was, however, found guilty on the other sixteen counts and was sentenced to imprisonment for five years on each, the sentences

to run concurrently (R. 36–37). The Circuit Court of Appeals for the Tenth Circuit affirmed the judgment (R. 152).

Petitioner did not take the stand and offered no evidence in his own behalf. The evidence for the Government pertaining to the issues raised in the petition for a writ of certiorari may be summarized as follows:

On July 15, 1944, two warrants were issued for the arrest of petitioner, one (R. 24–25) charging that he had used the mails in furtherance of a scheme to defraud the Mudge Oil Co., Dallas, Texas, of $25,000 (18 U. S. C. 338), and the other (R. 27–28) that he had caused a forged check for $25,000 to be transported in interstate commerce (18 U. S. C. 415). Armed with these warrants, two special agents of the F. B. I. went to petitioner's apartment in Oklahoma City at 1:30 p. m. on July 20, 1944, and placed him under arrest (R. 63–64, 84). The apartment consisted of a living room, bedroom, kitchen, and bath (R. 71), and petitioner was in the living room when arrested (R. 69). The warrants were read by petitioner, and the agents then proceeded to search the place in company with three associates who had arrived in the meantime (R. 64–65, 84). The object was to discover "any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a confidence game of this type"

(R. 66, 77, 78, 84–85). In particular, the agents were looking for two $10,000 canceled checks of the Mudge Oil Co., which had been stolen from the offices of that company (R. 65). No checks of any type were found (R. 69), but the search turned up seven or eight pens, some tissue paper, and 27 pieces of celluloid which could be used to pick a Yale lock (R. 79–82, 86–87). In the course of the search the agents opened a bureau drawer in the bedroom; under some clothes they found a sealed envelope marked "George Harris, personal papers"; upon opening this they found the eight incorrectly stamped Notice of Classification cards and the eleven Registration Certificates, his possession of which formed the basis of his indictment and conviction in the present case (R. 66–67, 72, 77–78, 82–83, 85–86). The agents had no prior knowledge that petitioner possessed these cards (R. 75–76, 85). At the time they found them they knew that possession of them was a crime under the Selective Service Act (R. 83).

The agent in charge of the search described it as being "as thorough as we could make it"; it extended to all the rooms of the apartment, and to such details as the mattress, the carpets, and the clothes closet (R. 71–72, 86). While it was in progress, petitioner was handcuffed, but he was allowed to move around (R. 70, 73). The agent in charge left about 2:00 p. m. to obtain

search warrants for petitioner's car and office; he returned about 5:00 p. m. (R. 70–71). Another agent left the apartment for "some period of an hour or so" (R. 84). The search began shortly after the agents had arrived at 1:30 p. m. (R. 64–65), and petitioner was not taken away for arraignment until 6:30 or 7:00 p. m. (R. 71, 73). The agent in charge explained that "we were making arrangements with the United States Commissioner to arraign him as soon as possible, and we had some difficulty * * * in locating the Commissioner, so that is why we stayed out there longer than we would have otherwise" (R. 71).

ARGUMENT

1. Petitioner admits that when a person has been legally arrested, the arresting officer may make a search and seize anything which it is unlawful for him to have and which may be used to prove the offense for which he is arrested, so long as it be found on his person or in his immediate control (Pet. 21, 26, 38); but petitioner contends, in effect, that where the arrest takes place in a room in a dwelling house, the search must be limited to that room and may not be extended to the other parts of a house (Pet. 4, 15, 21–26, 38). However, this Court has held that a home may be searched as an incident to a valid arrest therein, *Agnello* v. *United States*, 269 U. S. 20, 30, 32, 33, and it has further held that a search

may extend to all parts of the premises used for the unlawful purpose. *Marron* v. *United States*, 275 U. S. 192.[1] The protection of the Fourth Amendment is against "unreasonable" searches, and we submit that the ultimate question is not whether the search should be confined within a certain rigid locality but whether, under all the circumstances, it was reasonable. "There is no formula for the determination of reasonablness. Each case is to be decided on its own facts and circumstances." *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357. Consequently, we submit that under the decisions of this Court an officer who has made a valid arrest in a house may search all parts thereof if he has a sufficient reason to do so. If the whole house is under the immediate control of the arrested person, and if the search is strictly limited to the instrumentalities or the "fruits" of the offense for which the arrest is made, we think that a valid warrant of arrest affords authority for a search of the whole house.

---

[1] Petitioner cites the *Marron* case; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2); and *United States* v. *Tot*, 131 F. 2d 261 (C. C. A. 3), reversed on other grounds, 319 U. S. 463, in support of his contention that the search should be "limited." But the limitations spoken of in those cases relate to the things to be seized. In all of them the search extended beyond the room in which the arrest took place.

2. But petitioner contends that, even if it be permissible to search the entire house, any seizures must be limited to the instrumentalities of the offense for which the arrest is made, and may not be extended to matter which is merely evidential, or to instrumentalities of other offenses accidentally discovered during the course of the search (Pet. 4–5, 15, 28–37, 38–40). We agree as to objects which are evidential only, *United States* v. *Lefkowitz*, 285 U. S. 452, 464–466, and we shall endeavor to show in the next point that here the agents neither sought nor seized anything but the actual tools or fruits of crimes. However, we do not agree that officers, who are engaged in a reasonable search incidental to a valid arrest, must refrain from seizing the accidentally discovered means by which some other unrelated offense has been committed. It is axiomatic that when an offense has been committed in the presence of an officer, or when he has probable cause for believing that a felony has been committed, he has the right and the duty to arrest without a warrant. As an incident of that arrest, he may, and should, seize the instrumentalities or the fruits of the offense. It would be hypertechnical, then, to say that an officer who is conducting a legal search in connection with one crime may not seize the fruits of another crime when they are of such a nature as to convince him that the

second has been committed.[2] It is true that there is a statement in the *Lefkowitz* case to the effect that the authority of an officer to search a house contemporaneously with a lawful arrest therein "certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained." 285 U. S. at 464.[3] But there is a distinction between what is merely evidential and the means or the fruits of a crime. It has always been understood, as the *Lefkowitz* case points out,[4] that the former may not be seized, even under a search warrant. And what the *Lefkowitz* case meant was, as is clear from the facts involved, that an officer may not, in the execution of a valid warrant of arrest, search for and seize matter which is evidential only.

The issue here is whether an officer legally searching for the means of one crime may seize an object which is the means of another crime. When an object has been legally seized in con-

[2] In this case, the agent who discovered the cards testified that he was aware at the time that possession of them was a crime under the Selective Service Act (R. 83).

[3] 285 U. S. at 464, 465–466; and see *Boyd* v. *United States*, 116 U. S. 616, 622–624.

[4] Lefkowitz was arrested in his office by officers who held a valid warrant for him. They proceeded to make an "unrestrained" search of the office and seized a great many papers which "were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected." 285 U. S. at 464.

nection with one offense, it may then be used in prosecuting for another offense without the technicality of returning it to the owner, swearing out a new warrant and seizing it again. *Gouled* v. *United States*, 255 U. S. 298, 311–312. We think it likewise reasonable to permit the officer, who is engaged in a lawful search, and who happens upon the means of an unrelated crime in such a way as to give him probable cause to believe that the crime has been committed, to seize the object on the spot. No one, we think, would contend that an officer, who witnesses a felony while present in a home on a social visit must get a warrant before seizing the means of committing the crime. A number of circuit courts of appeals decisions have sanctioned seizures made under circumstances similar to those in the instant case. *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2); *United States* v. *Old Dominion Warehouse, Inc.*, 10 F. 2d 736 (C. C. A. 2); *Bennett* v. *United States*, 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788; *Paper* v. *United States*, 53 F. 2d 184 (C. C. A. 4); *Shelton* v. *United States*, 50 F. 2d 405 (C. C. A. 7); *Milam* v. *United States*, 296 Fed. 629 (C. C. A. 4), certiorari denied, 265 U. S. 586.

Of the cases cited by petitioner, *Takahashi* v. *United States*, 143 F. 2d 118 (C. C. A. 9), and *Cofer* v. *United States*, 37 F. 2d 677 (C. C. A. 5), involved seizures of evidence; *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C. C. A. 2), was

apparently also a seizure of evidence, and the Second Circuit has specifically recognized in the later case of *United States* v. *Poller*, 43 F. 2d 911, 913, that some of the language in the *Kirschenblatt* case must be modified in view of subsequent decisions of this Court. In the *Poller* case, in which certain papers were ordered returned, the agents do not seem to have had more than a suspicion that they were the instruments of a crime. In addition, in the still later *Matthews* case, *supra*, the Second Circuit specifically upheld a seizure which was in all material respects similar to the one involved here. None of the cases cited by petitioner support the proposition that an officer who searches a house under a valid warrant directing him to seize a gun may do nothing if he happens upon a supply of opium. A felony, concealment of the opium,[5] has been committed in his presence. Clearly it would be his duty to arrest the owner and to seize the contraband.[6]

3. Petitioner also contends that the search was unreasonable in that it was an unlimited ransacking of his home for the purpose of obtaining evi-

[5] 21 U. S. C. 174.

[6] In the *Marron* case, *supra*, this Court approved a seizure which went beyond the terms of a search warrant. The warrant directed seizure of intoxicating liquors and articles for their manufacture. Upon entry, the agents found that liquor was being sold. They arrested the proprietor, and as an incident to this arrest, seized a ledger which was "a part of the outfit or equipment actually used" to carry on the illegal business.

dence (Pet. 4, 14, 15–21, 37–40). As we noted above (*supra*, p. 7), the reasonableness of the search depends not upon formula but upon the circumstances of the particular case. *Go-Bart Co.* v. *United States*, 282 U. S. at 357; *In re Ginsburg*, 147 F. 2d 749 (C. C. A. 2).

We submit that this was a proper search for the instrumentalities of the crimes charged in the warrants of arrest. The agents testified that they were looking for the tools which petitioner had used in his confidence game (R. 66, 77), and specifically for checks, writing materials, and burglar tools (R. 65, 66, 77, 78). The agents had knowledge that petitioner had entered the locked offices of the Mudge Oil Co. at night (R. 100–123), that he had been in the office where the firm's checks were kept (R. 106), that two $10,000 canceled checks had been stolen from the offices (R. 65), and that shortly after his entry there he had placed in the mail a $25,000 check of the company which he knew to be forged (R. 23, 26). The search was necessarily "thorough," even to the extent of opening the envelope marked "Private Papers," since among the tools were the two canceled checks,[7] but there is no evidence that it

[7] As the circuit court of appeals said, "It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot, and it is not unlikely or unreasonable to assume that they would be found encased in an envelope where the draft cards and certificates were in fact discovered" (R. 150).

was destructive or unrestrained. And there is no evidence that anyone else lived in the apartment and was inconvenienced by the search. It is true that there were five agents and that they were in the apartment for about five hours. However, one agent was gone for about three hours (R. 70–71) and another was absent for about one hour (R. 84); and the agent in charge stated that they remained longer than necessary because of difficulty in locating the United States Commissioner (R. 71). The agents seized several pens and some tissue paper (R. 87), which are clearly instruments of forgery. They also seized 27 pieces of celluloid (R. 80). There was evidence that petitioner had entered the locked office of the Mudge Oil Co. (R. 100–123), and it was demonstrated to the court that these pieces of celluloid could be used to force similar locks (R. 81–82). Finally, the agents seized the Notice of Classification cards and Registration Certificates, possession of which they recognized as a crime (R. 83). In view of the nature of the things the agents were searching for, we think that the search was reasonable and that the arrest was not "used as a pretext to search for evidence"[8] as in the *Lefkowitz* and *Go-Bart* cases.[9]

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[8] *Lefkowitz v. United States*, 285 U. S. at 467.

[9] Petitioner also contends that the search was unlawful because the agents did not have probable cause for believing that the instrumentalities of the crimes charged in the warrants of arrest were in petitioner's apartment (Pet. 4, 15, 20–21, 26–28, 37–40). Probable cause has no relation to a search

4. Since petitioner insists (Pet. 5–8, 15–37 *passim*) that the decision of the court below is in conflict with decisions of this Court and of various circuit courts of appeals, we will briefly indicate the distinguishing characteristics of the cases cited. In the following cases, although the search warrant or the arrest was legal, the officers engaged in a search for evidence alone or in a general exploratory search with no specific object in view: *Boyd* v. *United States*, 116 U. S. 616; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; *Go-Bart Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452; *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C. C. A. 2) (cf. pp. 10–11, *supra*); *United States* v. *Thomson*, 113 F. 2d 643 (C. C. A. 7); *Takahashi* v. *United States*, 143 F. 2d 118 (C. C. A. 9).[4] In the following, the building was entered without a warrant and solely with the intent to make a search: *Weeks* v. *United States*, 232 U. S. 383; *Amos* v. *United States*, 255 U. S. 313; *Wakkuri* v. *United States*, 67 F. 2d 844 (C. C. A. 6); *Papani* v. *United States*, 84 F. 2d 160 (C. C. A. 9). In the following the warrant was invalid: *Byars* v. *United States*, 273 U. S. 28; *Veeder* v.

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made pursuant to lawful arrest. The right to make a lawful arrest carries with it, as the decisions heretofore cited establish beyond doubt, the incidental right of search. In any event, as the discussion in the text (pp. 12–13) shows, the knowledge which the agents had was sufficient to warrant them in their belief that the instruments of the offenses were in the petitioner's apartment.

United States, 252 Fed. 414 (C. C. A. 7), certiorari denied, 246 U. S. 675; *Honeycutt* v. *United States*, 277 Fed. 939 (C. C. A. 4); *Lawson* v. *United States*, 9 F. 2d 746 (C. C. A. 7). In *Cofer* v. *United States*, 37 F. 2d 677 (C. C. A. 5), a search warrant was issued for liquor but the officers deliberately sought guns and shells. In *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2) (cf. p. 11, *supra*), agents seized a number of papers upon arresting the defendant in his office; the court permitted them to retain those which were clearly the instruments of a crime, but ordered returned other papers which might have been the instruments of similar crimes; there is nothing in the opinion to show that the agents had anything more than mere suspicion that other crimes had been committed.

In the present case, on the other hand, the agents entered petitioner's home under valid warrants for the purpose of placing him under arrest. As an incident to that arrest, they searched the premises under petitioner's immediate control for certain specific objects which he had used in committing the crimes charged (cf. *Marron* v. *United States*, 275 U. S. 192). They accidentally discovered the cards and certificates, and knowing that possession of these was a crime, they seized them as the fruits of that crime.

CONCLUSION

The decision of the circuit court of appeals is correct, no real conflict of decisions is involved, and hence there is no occasion for further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 34

In the Supreme Court of the United States

OCTOBER TERM, 1946

GEORGE HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 145–152) is reported at 151 F. 2d 837.

JURISDICTION

The judgment of the circuit court of appeals was entered October 26, 1945 (R. 152), and a petition for rehearing was denied November 28, 1945 (R. 167). The petition for a writ of certiorari was filed December 28, 1945, and was granted June 10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Ap-

peals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether officers, who have arrested a person in his home under a valid warrant of arrest, may as incident to the arrest, search the premises for the instrumentalities or means of committing the crime of which the prisoner is accused, although at the time the officers do not see any crime being committed in their presence.

2. Whether the search of petitioner's home was a general exploratory search for evidence.

3. Whether a search incident to arrest must be limited to the room in which the accused is arrested.

4. Whether property accidentally uncovered during the search, which it was unlawful for petitioner to have in his possession but which related to a wholly different offense may be lawfully seized and used as evidence in a prosecution of the prisoner for such different offense.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The constitutional and other provisions involved are set forth in the Appendix, pp. 91–94, *infra*.

STATEMENT

After a trial by the court without a jury, petitioner was convicted in the District Court for the

Western District of Oklahoma on sixteen counts of a nineteen-count indictment (R. 34, 36). Of those counts on which petitioner was convicted, seven (counts 4 to 10, inclusive, R. 3–9) charged that on July 20, 1944, he unlawfully altered a Notice of Classification card in violation of Section 11 of the Selective Training and Service Act of 1940 and Selective Service Regulation 623.61–2 (Appendix, pp. 93–94, *infra*); seven (counts 12, and 14 to 19, inclusive; R. 10–11, 12–16) charged that on the same date he unlawfully had in his possession an altered Notice of Classification card in violation of Section 11 of the Act and Section 623.61–2 of the Regulations; one (count 2; R. 2–3) charged that on the same date he concealed eight Notice of Classification cards and eleven Registration Certificates, which had been stolen from a local draft board and which he knew had been stolen, in violation of Section 48 of the Criminal Code (Appendix, p. 92, *infra*); and one (count 3; R. 3) charged that on the same date he had these documents in his possession with intent to convert them to his own use and gain, in violation of Section 48.[1] Petitioner was sentenced to imprisonment for a term of five years on each count, the sentences to run concurrently (R. 36–

[1] Petitioner was acquitted on count 1, which charged theft of government property; while count 11, which charged alteration of a Notice of Classification card, and count 13, which charged possession of an altered card, were dismissed (R. 1–2, 9–10, 11–12, 36).

37). On appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of conviction was affirmed (R. 145–152).

At the trial the Government introduced in evidence the Notice of Classification cards and the Registration Certificates which form the basis of petitioner's conviction (Gov. Ex. 1–18; R. 90, 127–131). The only question here involved is whether these documents were obtained as the result of an illegal search and seizure. Prior to the trial, petitioner moved to suppress them as evidence (R. 18–32). The motion was denied (R. 34–35, 45). It was renewed several times during the trial, but was again denied (R. 35–36, 89–90, 123). The facts relating to the search and seizure appear in petitioner's motion to suppress and in the testimony of witnesses at the trial who were called by the Government to give evidence bearing on the search and seizure (R. 18–32, 62–89, 99–123).[2] The evidence relating thereto may be summarized as follows:

On July 15, 1944, a United States Commissioner, upon complaint of a special agent of the

[2] Petitioner filed a written motion to suppress December 4, 1944 (R. 18–32). The record does not disclose that the Government presented any matter in opposition. The motion was heard, presumably on the basis of petitioner's papers, on December 8, 1944, just before the case was called for trial, when it was denied (R. 34–35). The record does not indicate the occasion for further inquiry into the matter at the trial, but, in any event, after one witness testified concerning the merits of the case (R. 47–62), the Government called two

F. B. I., issued two warrants authorizing any special agent of the F. B. I. to arrest petitioner and one C. R. Moffett (R. 22–28). One of these warrants charged that petitioner and Moffett on or about March 7, 1944, had in violation of Section 215 of the Criminal Code (Appendix, pp. 92–93, *infra*), caused to be placed in the mails in execution of a scheme to defraud a letter addressed to the Guaranty Trust Company of New York for the purpose of cashing a forged check for $25,000, "drawn on the Mudge Oil Company and signed 'The Mudge Oil Co., E. W. Mudge, Jr., V. P., S. H. Newbery, Treas.', said check on the reverse side thereof containing the endorsement, 'American Oil & Gas Co., Blackwell, Oklahoma, by C. R. Moffett, Owner'" (R. 24–25). The second warrant charged that petitioner and Moffett on or about March 7, 1944, had, with intent to defraud certain banks and the Mudge Oil Company, caused the $25,000 forged check to be transported in interstate commerce from Blackwell, Oklahoma, to Pittsburgh, Pennsylvania, in violation of Section 3 of the National Stolen Property Act (Appendix, p. 93, *infra*) (R. 27–28).

At about 1:30 p. m., on July 20, 1944, Special Agents Melvin and Ware of the F. B. I., went to

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of the F. B. I. agents who had participated in the search and seizure (R. 62–89), and at a subsequent date, it called two other witnesses, whose testimony bore on those subjects (R. 97–123). Petitioner's motion to suppress was received as an exhibit at the trial (R. 90).

petitioner's apartment, at 2308 North Ellison Street, Oklahoma City, Oklahoma. They had the warrants of arrest with them (R. 63–64, 77, 83–84). Melvin identified himself to petitioner, showed him the warrants, and placed him under arrest (R. 64). The arrest was made in the living room of the apartment, which contained, in addition, a bedroom, kitchen, and bathroom (R. 69, 71). Petitioner was handcuffed (R. 70, 84), and the agents proceeded to search the apartment in company with three other agents who had arrived in the meantime (R. 64–65, 84). The agents testified that they were searching for "two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company,"[3] "for any means that might have been used to commit these two crimes [i.e., the offenses charged in the warrants of arrest], such as burglar tools, pens, or anything that could be used in a confidence game of this type"; "we thought we might find a photostatic copy [of the $25,000 check]"; "anything which would indicate a violation of the mail fraud statute and the

[3] An employee of the Mudge Oil Company testified that on March 6, 1944, she had returned to the company's offices after business hours. She unlocked the door, and came across a man in a room where the company's checks were kept. This man was the petitioner. (R. 400–406.) A friend of this employee, who was with her on this occasion, also identified petitioner as the man they saw in the office (R. 110–113, 116, 118).

National Stolen Property Act"; "we were searching for two blank checks and also searching for writing materials, burglar tools or anything of that nature which may have been used in perpetrating the crimes alleged" (R. 65–66, 69, 77–78, 84–85). Melvin, who was in charge of the search, described it as being "as thorough as we could make it"; it extended to each room of the apartment, and to such articles as the mattress of the bed, underneath the carpets, and the clothing closets (R. 71–72, 86). The agents stayed at the apartment until about 6:30 p. m. (R. 71).[1] The agents did not find any checks (R. 69). They did find and take away seven pens, tissue paper, and 27 pieces of celluloid (R. 79–80, 86–87). The latter were found wrapped in a towel in a drawer of the dresser in the bedroom (R. 79–81, 87). Ware testified that they could be used for picking a lock (R. 81–82). According to petitioner, as stated in his motion to suppress, the agents seized "blank stationery of various hotels, blank ruled sheets of paper, several old, broken and obsolete fountain pens, expense bills and receipts, personal mail letters, bill of sale for defendant's automobile, note books, address books,

[1] Apparently the search did not continue until that time. Melvin testified that they remained until 6:30 p. m., because they had encountered some difficulty in locating a commissioner in connection with arraigning petitioner (R. 71, 73). Petitioner in his affidavit asserted that the search continued until 8:00 p. m. (R. 20).

and some mineral deeds, * * * that the said articles * * * were wrapped in a package and carried away * * * in a package approximately one foot by one foot by two feet in size" (R. 20).

Ware, who had searched the dresser in which the celluloid was found, also found at about 5:00 p. m. in a drawer of the dresser, underneath some clothes, a sealed envelope marked "George Harris, personal papers" (R. 20, 66, 71, 77–78, 82–83, 85–86, 135; see also R. 66–67, 72). Ware opened the envelope, and in it were found the Notice of Classification cards and Registration Certificates involved (R. 66–67, 77, 83, 86).

At about 2:00 p. m., Melvin left the apartment for the purpose of securing a warrant to search petitioner's automobile and his office (R. 19, 70, 72). Melvin secured a warrant authorizing him to make a search of the automobile and office for "checks of The Mudge Oil Company and other forms of checks and other paraphernalia and the instrumentalities used in the perpetration of what is commonly known as the 'confidence game', or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books, * * * issued in violation of orders issued * * * by the Office of Price Administration" (R. 28–32). A search of the automobile and office was made (R. 20–21, 68, 73). No checks were found (R.

73). A letter was taken from the office (R. 73). According to petitioner, there were taken from the automobile "paid expense bills for repairs on said automobile; notebooks, and other personal belongings" (R. 21).

The only question considered by the circuit court of appeals was whether the search and seizure were reasonable (R. 145).[5] The court concluded that the search and seizure were justifiable as an incident to petitioner's lawful arrest. It stated that the record did not support petitioner's contention that the search was "general, exploratory and evidentiary"; that "the officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest" (R. 149); that the search for the two $10,000 checks which had been stolen from the Mudge Oil Company was under the circumstances a proper object of search; and the search for them did not exceed the bounds of reasonableness (R. 149–150). Finally, the court concluded that the seizure of the cards was proper, because officers legally searching as incident to a lawful arrest are entitled to seize "the instruments or the means of committing another and wholly unrelated offense unexpectedly uncovered by such search" (R. 150–152).

[5] The district court in ruling that the search and seizure were lawful did not give any reasons for its ruling.

SUMMARY OF ARGUMENT

1. A. The decisions of this Court prior to 1927 establish that, incident to a lawful arrest for crime, the arresting officers may, without additional judicial authorization, search the premises where the arrest took place for instrumentalities of the crime for which the defendant was arrested. *Weeks* v. *United States*, 232 U. S. 383, 392; *Carroll* v. *United States*, 267 U. S. 132, 158; *Agnello* v. *United States*, 269 U. S. 20, 30. But the search may not extend beyond the premises in which the arrest takes place. *Agnello* v. *United States*, *supra*, at 32–33. Except as to the search of the defendant's person, which is recognized to be unlimited in scope, the search of premises is as broad as, though no broader than, the search which could have been authorized by a search warrant.

B, C. In 1927, this Court in *Marron* v. *United States*, 275 U. S. 192, seems to have permitted a general exploratory search of premises, for papers merely evidencing crime, as incident to a lawful arrest. But later decisions—*Go-Bart Co.* v. *United States*, 282 U. S. 344, and *United States* v. *Lefkowitz*, 285 U. S. 452—condemned exploratory and general searches incident to an arrest, searches made simply to find papers evidencing defendant's guilt. If the *Marron* case has validity today, it is limited to situations where a crime is actually being committed in the presence of the arresting officers. But nothing in the *Go-Bart* or

Lefkowitz cases restricts the right of arresting officers, consequent upon and incident to a lawful arrest, to search the premises on which the arrest takes place for the fruits and instrumentalities of the crime for which the arrest was made. Both Congress and the lower federal courts have so understood those decisions.

D. The right to search, not only the defendant's person on arrest, but in addition the premises under his control for instrumentalities of the crime for which he is arrested, all as incident to his lawful arrest, is of ancient origin. Its recognition by the courts represents no encroachment on constitutional protection but rather a reaffirmation of the original boundaries of such protection.

The search of premises incident to an arrest is a practice that is reflected in the actual records of cases reported in *Howell's State Trials* and in the *American State Trials*. While the reported American appellate decisions prior to *Weeks* v. *United States*, 232 U. S. 383, *supra*, do not, for the most part, discuss the matter, it seems clear that the *Weeks* case was giving recognition to an actual practice so axiomatic that it had rarely been the subject of legal controversy. In the leading case of *Dillon* v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245, several times cited with approval by this Court, the right to search premises and seize papers incident to an arrest was based on the state's interest in bringing to justice persons

whose probable guilt had already been established to the point where their arrest could be justified; and *Entick* v. *Carrington*, 29 How. St. Tr. 1030, was held not controlling since there there was only suspicion and the entry into the premises could not be independently justified. Indeed, as a matter of history, exploratory searches of premises incident to an arrest would appear to be reasonable searches, and in England today the limitations of the *Lefkowitz* case are not law. *Elias* v. *Pasmore*, [1934] 2 K. B. 164.

Whatever its precise historical origins, the right to search premises for the instrumentalities of crime as an incident to a lawful arrest for that crime has been consistently recognized by judges and legislators. A search incident to an arrest carries with it none of the evils of general warrants or writs of assistance. The search is limited to one particular time, to one particular place, and to particular objects, viz., the fruits or instrumentalities of the crime for which the accused is arrested. The existence of probable cause must first be established as grounds for the arrest. There is thus no possibility that a search incident to an arrest can be extended to cover a general search on mere suspicion alone, which was the particular evil at which the Fourth Amendment was directed.

2. The search here was not a general exploratory search for evidence of petitioner's guilt of crime. The record shows that the objects of the

search were the instrumentalities of the offenses for which petitioner was arrested, viz., the two $10,000 cancelled checks used to commit mail fraud; writing materials; and burglar's tools. The fact that the agents proceeded to make a search for these objects after they had effected petitioner's arrest does not establish that their purpose in entering the apartment was to make a general exploratory search rather than to execute the warrant of arrest. Nor is it significant that during the course of the search the agents secured a warrant to search petitioner's automobile and office upon an affidavit which might have been inadequate for that purpose because it failed to set forth the ground of the agents' belief that petitioner had committed the crime. The warrant or arrest shows that probable cause sufficient to satisfy a judicial officer did in fact exist. Indeed, the circumstance that the agents sought such a warrant indicates that they felt themselves bound by *Agnello* v. *United States*, 269 U. S. 20, which condemned searches of premises other than those in which the arrest took place.

Considering the nature of the objects sought, the search was clearly reasonable; it was no more extensive than was necessary to uncover the articles which were the instrumentalities of the crime for which petitioner was arrested. A search otherwise reasonable does not become unreasonable simply because it is thorough; a search pre-

destined to failure is not the only one which satisfies the Fourth Amendment.

3. The search was not improper because it extended beyond the living room of petitioner's apartment where the actual arrest took place. The cases in this Court indicate that, if the search incident to an arrest is otherwise lawful, it may extend to the entire premises under the control of the arrested person. The lower federal courts have consistently assumed that the area of search is not limited merely to the room in which the arrest is made. And it would be highly artificial to restrict the area of search to the particular portion of the premises where the arrest chances to take place. If the defendant is lawfully arrested in a bathroom or a clothes closet, it certainly cannot follow that only the bathroom or the closet may then be searched for the instrumentalities of his offense.

4. The seizure of the eight Notice of Classification cards and the eleven Registration certificates, petitioner's possession of which formed the basis of his conviction in this case, was proper, as was their introduction in evidence. The agents were not searching for these documents. They did not know when they embarked on the search that petitioner had them in his possession. It is clear that it was unlawful for petitioner to have the documents in his possession. The decisions of this Court and the lower federal courts

establish that if, in the course of a valid search, contraband is uncovered, i. e., an article the very possession of which is a crime, it may be seized. And since the documents here were lawfully taken, they could be used to prosecute petitioner for an offense unrelated to that upon which the search was founded.

ARGUMENT

As has been set forth in the Statement, *supra*, pp. 4–6, petitioner was arrested at his apartment by agents of the F. B. I., whose authority proceeded from warrants charging that petitioner and one Moffett had violated the Mail Fraud Statute and the National Stolen Property Act. The specific allegations of the warrants were that petitioner and Moffett, in execution of a scheme to defraud, had placed in the mail a letter which contained a forged $25,000 check purporting to have been made by the Mudge Oil Company and had caused this check to be transported in interstate commerce. The lawfulness of petitioner's arrest is not questioned. Immediately after they arrested him, the agents, who did not have a search warrant, proceeded to make a thorough search of the four rooms of petitioner's apartment in order to find, according to their testimony, two cancelled $10,000 checks which had been issued by the company and subsequently stolen from its offices, and burglar's tools. Petitioner had had an opportunity to steal the checks (p. 6, *supra*). The

agents did not find any checks, but after searching for several hours, they found in a dresser drawer in the bedroom numerous pieces of celluloid capable of being used to pick locks and also an envelope which contained a number of Selective Service Registration Certificates and Notice of Classification cards (pp. 7–8, *supra*). Petitioner's possession of these documents formed the basis for his conviction in this case.

Petitioner attacks on several grounds the holding of the circuit court of appeals that the search and seizure were reasonable. He argues (1) that the search was exploratory to find evidence of his guilt of crime (Pet. 4, 14–15, 15–21, 38); (2) that a search incident to an arrest may not extend beyond the person of the accused or "things" in his "immediate" control (Pet. 4, 15, 21–26); (3) that under the circumstances disclosed by the record, the agents did not have "probable cause" for securing a search warrant, and, therefore, they had no right of search incident to arrest (Pet. 4, 15, 26–28); and (4) that "evidence" discovered during the course of a search may not be utilized to convict an accused of an offense unrelated to the charge on which he was arrested and which supported the search (Pet. 4–5, 15, 28–37).

Our study of the case, in the light of some judicial doubts recently expressed,[3] has led us to

[3] See Frankfurter, J., dissenting, in *Davis* v. *United States*, No. 404, Oct. T. 1945, decided June 10, 1946, at pp. 12–15 of slip opinion, quoted at length below, pp. 44–47.

the view that it presents another question, not advanced directly by petitioner, namely, whether, as incident to an arrest in a private dwelling upon warrants charging a use of the mails to defraud and the transportation of a forged check in interstate commerce, a search of the dwelling for the instrumentalities of the offenses charged in the warrants of arrest is permissible where, upon making the arrest, there is nothing to indicate to the officers that any offense is being committed on the premises. We shall first state our views on this matter, and then discuss petitioner's more specific contentions.

I

IT HAS ALWAYS BEEN HELD THAT ONE OF THE INCIDENTS OF A LAWFUL ARREST IS THE RIGHT TO SEARCH THE PREMISES UNDER THE CONTROL OF THE PERSON ARRESTED FOR THE INSTRUMENTALITIES OF THE CRIME OF WHICH HE IS ACCUSED, AND THAT SUCH A SEARCH IS A REASONABLE ONE WITHIN THE FOURTH AMENDMENT

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The historical background of this Amendment is set forth in *Boyd* v. *United States*, 116 U. S.

616.[7] The particular grievance which led to the adoption of the amendment was the English practice of issuing general warrants unlimited as to person, place, or time, by which officers were allowed to arrest or search any person or place on mere suspicion alone. That generality was the specific evil toward which the amendment was directed is shown by the fact that, as originally proposed, it read as follows (*Annals of Congress*, 1st Cong., 1st sess., p. 754):

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.

The first American precedent for the amendment, that in the Virginia Bill of Rights, was limited to a prohibition against general warrants alone. Lasson, *op. cit.*, p. 79.

The Fourth Amendment has never been interpreted as excluding all searches and seizures without a warrant. Although it guarantees protection of the "person," the right to arrest, to seize the person, without a warrant under circumstances recognized as reasonable under common law principles, is well established. See *Carroll* v. *United*

[7] For a more detailed treatment, see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, Johns Hopkins University Studies in Historical and Political Science, Series LV, No. 2 (1937).

States, 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt*, 115 U. S. 487, 504. Similarly, this Court has held that a search and seizure of property without a warrant may be reasonable under certain circumstances, e. g., where there is probable cause to believe that a moving vehicle is being used in the commission of a crime. *Carroll* v. *United States*, *supra*, 267 U. S. at 149; *Lee* v. *United States*, 274 U. S. 559, 563. And, as we point out more in detail below, it has always been held by this Court that a dwelling house may lawfully be searched without a search warrant as an incident to a lawful arrest therein. *Agnello* v. *United States*, 269 U. S. 20, 30; *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392.

The court below, relying on these cases, likewise held that the right to search without a warrant the premises under the control of the person arrested at the time of his arrest is as well established as the right to arrest without a warrant or the right to search a moving vehicle on the basis of probable cause without a warrant. The theory seems to have been, as the Circuit Court of Appeals for the Ninth Circuit phrased it in *Papani* v. *United States*, 84 F. 2d 160, 162, that "an arrest serves the function of a search warrant." It is because the dissenting opinion in *Davis* v. *United States*, No. 404, Oct. T. 1945, decided June 10, 1946, questions the historical valid-

ity of this assumption that we feel impelled to explore the matter now.

A. *The cases in this Court prior to 1927 establish that the right to search premises for instrumentalities of crime is an incident of a lawful arrest therein.*

In 1914, in *Weeks* v. *United States*, 232 U. S. 383, this Court first held that the fruits of an illegal search were not admissible in evidence. Yet in this very case, it was assumed that there was a right to search upon arrest, not only the person of the accused, but also the premises under his control. In stating the questions excluded from its consideration this Court said (232 U. S. at 392):

> What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, Crim. Plead. and Practice, 8th ed., § 60; *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise

> competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused.

This recognizes as a separate, well established category,[8] independent of the right to search the person, the right to search for instrumentalities of the crime "upon his arrest within the control of the accused." The Court cites no cases for this proposition, considering it to be both recognized and settled.

Soon after the *Weeks* doctrine became established, there followed the passage of the National Prohibition Act; the impact of the one on the other focused attention on the problem of searches and seizures, and made that one of the burning constitutional issues of the 1920's. We shall not undertake to list, analyze, or classify the clouds of decisions on this subject during the Prohibition Era. It seems sufficient to note that the right to search, as incident to an arrest, not only the person but the premises of the person arrested as well, was widely recognized by both the state and federal courts.[9] There was some disagreement in the decisions as to the area subject to search upon arrest.[10] But with few ex-

[8] It is evident that the court was excluding from consideration situations which were not open to question.

[9] See, for collections of cases, 32 A. L. R. 697–700; 51 A. L. R. 424–439.

[10] See 32 A. L. R. 697–700.

ceptions (see *Wiggin* v. *State*, 28 Wyo. 480 (1922); *State* v. *Adams*, 103 W. Va. 77 (1927)) there was no discussion of possible differences between the right to search where a crime was actually being committed, and search on arrest for a past crime, and no analytical distinction between the right to seize property open to view and the right to search for concealed instrumentalities of a crime. One of the first state decisions following the *Weeks* case, *People* v. *Cona*, 180 Mich. 641 (1914), upheld a search for as well as a seizure of the instrumentality of a past crime, i. e., a gun found in the defendant's bureau drawer when he was arrested in his home for the crime of murder. Other federal and state decisions of the period also upheld searches as incident to a lawful arrest for a past crime. *Mattus* v. *United States*, 11 F. 2d 503 (C. C. A. 9); *Furlong* v. *United States*, 10 F. 2d 492 (C. C. A. 8); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2); *Argetakis* v. *State*, 24 Ariz. 599 (1923); *Commonwealth* v. *Grasse*, 80 Pa. Super. 480 (1923); *Commonwealth* v. *Phillips*, 224 Ky. 117 (1928); *State* v. *Gorman*, 196 Iowa 237 (1923); *Patton* v. *State*, 43 Okla. Crim. 436 (1929); *Keeler* v. *Myers*, 119 Ore. 517 (1926); *State* v. *Evans*, 145 Wash. 4 (1927).

The important decisions of that period are the decisions of this Court. In *Carroll* v. *United States*, 267 U. S. 132, it was held that a warrant was not necessary to justify the search of a mov-

ing vehicle, but that it was sufficient if the searching officer had probable cause for his belief that the contents of the automobile were offending the law. In the course of that decision, this Court observed (267 U. S. at 158):

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.

In *Agnello* v. *United States*, 269 U. S. 20, decided in October 1925, agents looking through the windows of the home of one Alba saw Frank Agnello produce a number of packages for delivery to a government agent, who had previously arranged to purchase narcotics, and saw the latter hand over money to Alba. The agents then rushed in and arrested all the defendants. They found some of the packages on the table where the transaction had occurred, found others in another room, and still others in Frank Agnello's pockets. Some of the agents then went to Angello's home, some blocks away, searched it, and in his bedroom found a can of cocaine. The searches and seizures at Alba's home covered the entire premises;[1] they were held proper as inci-

[1] There were four rooms. R. 62, No. 6, Oct. T. 1925. The agents entered through the kitchen, and found the packages on the table in the dining room, where the men were arrested, and in one bedroom. R. 129, 219. One agent testified that he "searched all around the place." R. 219.

dent to the arrest, the Court saying (269 U. S. at 30):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

But the search and seizure at Agnello's home were held to be unlawful, on the ground that the right to search as incident to an arrest did not extend to places removed from the place of arrest. In this connection, the Court said (269 U. S. at 32, 33):

> While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. * * * Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant.

That there were limitations on the right to search was still clear; even as an incident to a lawful arrest, officers could not make a general exploratory search for evidence. See *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C. C. A. 2).

There, upon a lawful arrest for a prohibition violation, the officers searched the premises and seized liquor and papers. The government argued that the arrest gave power to search for and seize both, arguing "that, since a person arrested may be searched, and all documents found upon him may be kept whatever their nature, and since the premises in which he is arrested may be searched for contraband as an incident to the arrest, the search so authorized must be as broad as the search of his person." 16 F. 2d at 202–203. The court, through Learned Hand, J., rejected this contention, saying (pp. 203, 204):

> While we agree that strict consistency might give to a search of the premises, incident to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed, * * * the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant.

Up to this point, then, except as to search of the person, the search incident to a lawful arrest was as broad as—though no more broad than—the search which could have been authorized by a search warrant.

B. *There may be an exception permitting search of the premises for evidentiary papers incident to*

a lawful arrest in cases where a crime is actually being committed in the presence of the arresting officers.

In 1927, the Court decided *Marron* v. *United States*, 275 U. S. 192, a case which produced considerable confusion until it was finally explained, distinguished, and limited. There, petitioner was lessee of the second floor of certain premises. A prohibition agent secured a warrant for their search and for the seizure of intoxicating liquors and articles for their manufacture. Four agents went to the place. It contained six or seven rooms and was being used for the sale and consumption of intoxicating liquor. Petitioner was not there but one Birdsall was in charge. The agents handed him the warrant and arrested him. They searched for and found large quantities of liquor, some of which was in a closet. While searching the closet, they noticed a ledger showing inventories of liquor, and receipts relating to the business. Beside the cash register they found a number of bills for gas, electric light, water, and telephone service furnished to the premises. They took the ledger and the bills. The Court held that although the seizure of the ledger and bills could not be justified under the warrant because they were not mentioned therein,[12] their seizure was proper as an incident to Birdsall's

[12] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under

arrest. In this connection the Court said (275 U. S. at 198–199):

> * * * The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra,* 30; *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States, supra,* 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers* v. *United States,* 2 F. (2d) 146; *Kirvin* v. *United States, supra; United States* v. *Kirschenblatt, supra.* The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if

a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." 275 U. S. at 196. See note 37 below, pp. 85–86.

not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

The *Marron* case was generally understood to remove the restrictions on searches of premises incident to arrests. The Second Circuit, which had insisted on those restrictions in the *Kirschenblatt* case, took the *Marron* case as overruling the limitations there expressed. *United States* v. *Gowen*, 40 F. 2d 593 (C. C. A. 2); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2). In view of the way in which this Court soon qualified the *Marron* decision, examination of the intervening Second Circuit rulings is illuminating.

In the *Poller* case, the defendant was arrested on reasonable cause to believe that he had committed a felony by trying to enter goods into the United States by means of false documents—watch movements manifested as chocolate sweets—in violation of 19 U. S. C. 491. Immediately upon his arrest, the agents searched the small shanty which was his place of business, and took therefrom various papers, some bearing on the importation of the shipment in question, and some relating to earlier transactions. The court was of opinion that its earlier decision in *United States* v. *Kirschenblatt*, 16 F. 2d 202, *supra*, had been overruled by the Supreme Court in the *Marron* case, that

consequently the arrest must be given a wider latitude of search than a search warrant itself, and that therefore the papers directly related to the particular offense were subject to seizure, although other papers, dealing with earlier shipments, must be returned. Judge Learned Hand, for the court, said (43 F. 2d at 913 and 914):

> When a man is arrested, the extent to which the premises under his direct control may be searched has proved a troublesome question. We tried in Kirschenblatt's Case to set limits upon it narrower than those recognized in the broad statements of the textbooks (Wharton, Criminal Procedure, § 97; Bishop, Criminal Procedure, § 211); and in some of the decided cases. This we did, following as best we could the doctrine as we understood it of the Supreme Court, and because it seemed unreasonable to suppose that an arrest should give wider latitude of search than a search warrant itself. We were not in accord with at least the language of a number of the cases in other circuits, which followed the usual form of statement that the search might include any evidence of the crime. * * * One of these, *Marron v. U. S.*, went to the Supreme Court and was affirmed (275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231), in which the seizure of a number of documents was sustained, which certainly went beyond anything which we had recognized as permissible. In *U. S. v. Gower* (C. C. A.) 40 F. (2d)

593, we had occasion to reconsider Kirschenblatt's Case, and there we held that it must be deemed overruled. Although *U. S.* v. *Gowen* is now before the Supreme Court on certiorari, we must adhere to it until otherwise advised, and indeed nothing has occurred to change our views as to the scope of the Supreme Court's decision.

* * * * *

In conclusion it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime. The remedy may not be very extensive, but it is something, and it is all that can be given, as we understand the present decisions. A man is certainly subject to some search of his premises upon his arrest; if it would have been better to allow nothing without warrant but a search of his person, it is too late to hold so now.

Even more significant is *United States* v. *Gowen*, 40 F. 2d 593, *supra*. There a warrant was issued for the arrest of Gowen and Bartels, officers of the Go-Bart Company, on a charge of conspiracy to sell intoxicating liquors. The next day agents went to the company's office, where they found Bartels. One of the agents told him that they had a warrant of arrest and a search warrant. They arrested him and searched his person. Gowen then arrived and was arrested. The agents compelled him to open a desk and safe, searched them and other parts of the office, and seized a large quantity of papers belonging to the defendants. They moved to have the papers restored to them and suppressed as evidence, and, on denial of the motions, appealed.

The Circuit Court of Appeals rejected appellants' attempt to distinguish the *Marron* case on the ground that there the arresting officers had evidence of crime committed in their presence (40 F. 2d at 595), and likewise their attempt to distinguish it on the ground that while there the documents seized were instrumentalities of the crime, here they were merely incriminating evidence. On the latter point the court said (40 F. 2d at 597, 598):

> The privilege of search incidental to a lawful arrest is not limited to search of the person; it extends to the premises where the arrest was made, and permits seizure of property there located and within the con-

trol of the accused, if it be contraband, as in *Carroll* v. *United States*, *supra*, or "things used to carry on the criminal enterprise," as in *Marron* v. *United States*, 275 U. S. 192. * * *.

> This case the appellants attempt to distinguish upon the ground that the papers and ledger there seized were instruments of the crime of maintaining a nuisance, while here the papers and documents are merely incriminatory evidence of the crime of conspiracy. We do not think the distinction can be substantiated. * * * We regard the *Marron* case as controlling and as sustaining the seizure in suit. In *United States* v. *Kirschenblatt*, *supra*, this court laid down a more limited doctrine, but we do not think it can stand after the *Marron* Decision.

On certiorari, *sub nom. Go-Bart Co.* v. *United States*, 282 U. S. 344, this Court reversed. It considered the case on the assumption that the facts of which the agents had knowledge prior to the arrests justified the arrests without a warrant; but it held that, notwithstanding the lawful arrests, the search of the premises and the seizure of the documents there found were unreasonable. The Court said (282 U. S. at 357–358):

> There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed.

> And there is no suggestion that Gowen or Bartels was committing crime when arrested. * * * By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. *It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306. (Italics added.)

Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who, in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

Actually, in the *Marron* case (No. 185, Oct. T. 1927), while the bills were found alongside the cash register in the kitchen (R. 107), the liquor seized was found in an icebox and a closet in the kitchen and in a closet in the front room (R. 97, 118), while the ledger was found in the closet in the front room (R. 98, 118, 126). The closet was locked when the agents entered (R. 121).

In *United States* v. *Lefkowitz*, 285 U. S. 452, a warrant was obtained for the arrest of Lefkowitz and Paris on a charge of conspiracy to sell, possess, transfer, deliver, and take orders for intoxicating liquors. A deputy marshal and four prohibition agents went to the office which consisted of a room divided by a partition. In one part were a stenographer's desk, used by Paris, a towel cabinet, and a waste basket; in the other part were another desk and basket. When the officers arrived, they found Lefkowitz and arrested him. The agents then searched both desks and the towel cabinets and took away books, papers, and other articles. The Court concluded that the search and seizure could not be justified as incident to respondent's arrest. In the course of its opinion the Court said (285 U. S. at 463–466):

> The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, pa-

pers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

* * * * *

Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. Gouled v. *United States*, 255 U. S. 298, 310.

* * * * *

Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment

> of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U. S. 616, *et seq.* *Weeks* v. *United States*, 232 U. S. 383, 395. *Gouled* v. *United States supra*, 306. *Carroll* v. *United States, supra.* [Italics added.]

The *Marron* case was again distinguished (285 U. S. at 465), this time on the ground that the barkeeper was maintaining a nuisance, that the offense involved an element of continuity, that no search was made for the ledgers and bills which were said to be "in plain view," and that the facts set out in the opinion "justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise."[14]

The foregoing survey covers the cases decided by this Court.[15]

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[14] As has been pointed out, note 13, *supra*, p. 33, the record in the *Marron* case shows that the ledger was in a locked closet in the front room at the time of seizure.

[15] In *Taylor* v. *United States*, 286 U. S. 1, it was held that breaking into a garage to seize whiskey therein was not rendered lawful by a subsequent arrest of the defendant. The Court noted that (286 U. S. at 6) "This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support some future arrest."

We read the *Go-Bart* and *Lefkowitz* cases as forbidding only a general exploratory search for incriminatory papers as an incident of a lawful arrest, i. e., as prohibiting the seizure of documents which could not have been justified as the result of a search under a warrant, since no such warrant could have been justified by law, see *Gouled* v. *United States*, 255 U. S. 298—and not as forbidding a search of the premises for the fruits or instrumentalities of crime incident to the same lawful arrest.

The Second Circuit has so read the cases. Before the *Marron* case, the judges there held that a lawful arrest did not authorize a search of the premises for incriminatory papers. *United States* v. *Kirschenblatt*, 16 F. 2d 202, *supra*. After the *Marron* case, they held that it did. *United States* v. *Gowen*, 40 F. 2d 593; *United States* v. *Poller*, 43 F. 2d 911, both discussed *supra*, pp. 28–32. After the reversal in the *Gowen* case, *sub nom. Go-Bart Co.* v. *United States*, 282 U. S. 344, they reapplied the *Kirschenblatt* limitations. *Lefkowitz* v. *United States Attorney*, 52 F. 2d 52, affirmed *sub nom. United States* v. *Lefkowitz*, 285 U. S. 452.

It is significant also, we believe, that while the Second Circuit refused in the *Gowen-Go-Bart* situation to distinguish the *Marron* case on the ground that the former involved merely incriminating evidence while *Marron* dealt with instru-

mentalities of crime, see 40 F. 2d. at 597–598, *supra* pp. 31–32, this Court, which could naturally "distinguish" its own decisions more broadly, made just precisely that distinction in the *Lefkowitz* case—though just how ledgers in a locked closet and bills for supplies and services already furnished would be held to "justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise" (285 U. S. at 465) may well require more explanation than this Court gave it at the time.

Much was made in the *Go-Bart* and *Lefkowitz* cases of the distinction that in the *Marron* case a crime was in process of being committed at the time of the arrest, 282 U. S. at 358; 285 U. S. at 465. Here again, this is a distinction which the Second Circuit did not feel free to make while the *Marron* doctrine was in force. *United States* v. *Gowen*, 40 F. 2d at 595, *supra* pp. 31–32. It may be that a vestige of the *Marron* doctrine is still in force as to evidentiary searches and seizures of premises consequent upon an arrest for a crime actually being committed in the arresting officers' presence. Cf. *United States* v. *Davis*, 151 F. 2d 140, 143–144 (C. C. A. 2), affirmed, No. 404, Oct. T. 1945, decided June 10, 1946; *Dillon* v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245. But we have no occasion to consider that problem here, since in the instant case it is not, nor could it be, contended that any crime was being committed in

the arresting officers' presence when petitioner was arrested.

We say only that nothing in the *Go-Bart* and *Lefkowitz* cases restricts the right of arresting officers, consequent upon and incident to a lawful arrest, to search the premises for the fruits and instrumentalities of crime—i. e., to make a search of the scope and for the purposes for which a search warrant could lawfully be issued.

We think it follows that the law applicable to the state of facts presented by the instant case may therefore be stated as follows:

As incident to a lawful arrest, the arresting officers—

(i) May search the person of an accused, and may use as evidence against him anything found on his person, including incriminating private papers;

(ii) May search the premises under his immediate control for instrumentalities of the crime for which he is arrested, as fully as if they had a valid search warrant for such instrumentalities;

(iii) May not conduct a general exploratory search of the premises looking for incriminatory papers, mere evidence of crime, any more than they could get a valid search warrant for such papers or evidence—except possibly when a crime is actually being committed in their presence.

We think it follows that the right to search the premises incident to an arrest is coextensive with

the right to search such premises under a search warrant. And, as we shall proceed to point out, the lower federal courts and the Congress have acted on that understanding.

C. *The Go-Bart and Lefkowitz cases have been uniformly understood to hold that a search of premises incident to a lawful arrest has as wide a scope as a search authorized by a search warrant, and is limited to the objects for which such a warrant could issue.*

The *Go-Bart* and *Lefkowitz* cases have been uniformly interpreted by the circuit courts of appeals as they were in the ruling below, namely, that these cases prohibit a general exploratory search for evidence, as distinguished from the instrumentalities of the crime, on the ground that purely evidential materials would not be subject to seizure even under a warrant. *United States v. Stappenbach*, 61 F. 2d 955, 957 (C. C. A. 2); *In re 14 East 17th Street*, 65 F. 2d 289, 292 (C. C. A. 2); *Landau v. United States Attorney*, 82 F. 2d 285, 287 (C. C. A. 2); *United States v. Lindenfeld*, 142 F. 2d 829, 832 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Foley v. United States*, 64 F. 2d 1 (C. C. A. 5); *Parks v. United States*, 76 F. 2d 709, 710 (C. C. A. 5); *United States v. Thomson*, 113 F. 2d 643 (C. C. A. 7); *Papani v. United States*, 84 F. 2d 160, 163 (C. C. A. 9); *Takahashi v. United States*, 143 F. 2d 118, 124 (C. C. A. 9).

The circuit courts of appeal have continued to assume that, when an entry is lawfully made to effect an arrest, either under a warrant of arrest for a past crime, or on probable cause to believe that a felony has been committed, or because of a crime committed in the officer's presence, the arresting officer may, as a lawful incident of arrest, conduct a reasonable search of the premises under the control of the person arrested to discover and seize the instrumentalities of the crime. See cases collected in *United States* v. *Lindenfeld*, 142 F. 2d 829, 832 (C. C. A. 2), certiorari denied, 323 U. S. 761. See also *Shaw* v. *United States*, 155 F. 2d 628, 630 (C. C. A. 4), certiorari denied June 10, 1946 (No. 1285, Oct. T. 1945); *Morton* v. *United States*, 147 F. 2d 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875. As Judge Clark said in a recent decision (*United States* v. *Lindenfeld*, *supra*), "Surely when there is a lawful arrest, the premises may be searched." A number of recent federal decisions upholding the right of search incident to an arrest (in addition to the ruling below) involve the factual situation of an arrest for a past crime. *Morton* v. *United States*, 147 F. 2d 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761; *United States* v. *Tot*, 131 F. 2d 261 (C. C. A. 3), reversed on other grounds, 319 U. S. 463; *United States* v. *Bell*, 48 F. Supp. 986 (S. D. Cal.).

State authorities are to the same effect. *Connell* v. *State*, 215 Ind. 318 (1939); *State* v. *Conner*, 59 Idaho 695 (1939); *State* v. *Long*, 336 Mo. 630, 640 (1935); *State* v. *Rasser*, 162 Ore. 293, 349 (1939); *Elg* v. *State*, 129 Tex. Cr. 29 (1935).

The question of the right to search incident to an arrest for a past crime, where the arrest is made pursuant to a warrant, was explicitly discussed in *United States* v. *Tot*, 131 F. 2d 261 (C. C. A. 3), reversed on other grounds, 319 U. S. 463. There, Tot had been arrested by federal officers at his home on a warrant charging theft of cigarettes from an interstate shipment. The officers asked Tot whether he had a gun, and he replied in the affirmative—that it was in the pocket of his coat which was hanging in a wardrobe closet in his bedroom. One of the officers went to the closet, found the coat, and seized the gun. Pretermitting the question of consent, the court held that there was a lawful search and seizure, saying (131 F. 2d at 264):

> Undoubtedly upon Tot's arrest under a valid warrant, as this was, his person could have been searched and the weapon taken from him. The same privilege to search the place where the arrest is made "in order to find and seize things connected with the crime as its fruits * * *, as well as weapons and other things to effect an escape from custody, is not to be doubted."

The opinion cites *Agnello* v. *United States*, 269 U. S. 20, 30, for the language in quotation marks, and in a footnote says with reference to that case (footnote 4, 131 F. 2d at 264):

> The Court states that this privilege exists where the arrest is made for a crime committed in the presence of the arresting officers. The latter requirement merely establishes the lawfulness of an arrest without a warrant, as in the *Agnello* case. When the arrest is made with a warrant, as here, the requirement is unnecessary, for then, the privilege of search and seizure, being incidental to a lawful arrest, is as extensive.

The doctrine that a lawful arrest confers a right to search the premises under the control of the person arrested, irrespective of the basis on which the arrest is made, has also received Congressional recognition. In 1935, three years after the *Lefkowitz* decision, when Congress passed legislation necessitated by the repeal of prohibition, it re-enacted the provision of the prohibition act making it a penal offense for an officer to search a dwelling house without a warrant,[*] and added the following provision (Act of August 27, 1935, c. 740, sec. 201, 49 Stat. 877, 18 U. S. C. 53a):

> *Provided*, That nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting

[*] See *Carroll* v. *United States*, 267 U. S. 132, 144–147.

> to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

The committee reports (74th Cong., 1st sess., S. Rep. 1330, p. 5; H. Rep. 1601, p. 5) explain the addition as follows:

> This addition is merely a restatement of the common law on the subject, and is desirable inasmuch as it avoids the possible construction that the broad penalty feature of the section was intended to exclude the operation of the common-law rule in this regard.

D. *The right to search premises under the accused's control for instrumentalities of crime as an incident to his lawful arrest is of ancient origin, and its recognition by the courts represents not an encroachment on constitutional protections but rather a reaffirmation of their original boundaries.*

At the last Term, however, in the course of his dissenting opinion in *Davis* v. *United States,* No. 404, decided June 10, 1946, Mr. Justice Frankfurter suggested that the *Go-Bart* and *Lefkowitz* cases were designed to limit the concept that a search of premises incident to an arrest was reasonable, distinguishing the situation where the fruits or instrumentalities of the crime were in

open view and thus subject to seizure without search. He said (slip opinion, pp. 13–15):[1]

> A casual and uncritical application of this right to search the person of the prisoner has led some decisions in the lower federal courts to an unwarranted expansion of this narrow exception, with resulting inroads upon the overriding principle of the prohibition of the Fourth Amendment. Slight extensions from case to case gradually attain a considerable momentum from "judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right." *Byars v. United States*, 273 U. S. 28, 33–34. In cases dealing with the search of the person it is natural to speak of the right to search and seize things "in his possession" without strict regard to the ambiguous scope of a man's "possession." From that, opinions slide readily to including the right to search and seize things "within the immediate control" of the arrested person, language appropriate enough when applied to goods which the arrested person was transporting at the time. Taken out of their original context, these phrases are used until they are made to include the entire premises in which the arrest takes place. Another factor enters. This language is

[1] The citations in the footnotes of the opinion have been omitted.

sometimes used in cases involving the seizure of items properly subject to seizure because in open view at the time of arrest. But this last confusion is due to a failure to distinguish between the appropriate scope of a search on arrest and the very different problem as to the right of seizure where no search is in question.

It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. See Mr. Justice Miller, in *Boyd* v. *United States*, 116 U. S. 616, 638, 641. Thus, it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper. *E. g., Gouled* v. *United States*, 255 U. S. 298. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure, *e. g., Amos* v. *United States*, 255 U. S. 313; *Byars* v. *United States*, 273 U. S. 28; *Taylor* v. *United States*, 286 U. S. 1. And a search may be improper because of the object it seeks to uncover, *e. g., Weeks* v. *United States*, 232 U. S. 383, 393–94, or because its scope extends beyond the constitutional bounds, *e. g., Agnello* v. *United States*, 269 U. S. 20.

The course of decisions here has observed these important distinctions. The Court has not been indulgent towards inroads upon the Amendment. Only rarely have its dicta appeared to give undue scope to the right of search on arrest, and

> *Marron* v. *United States, supra*, is the only decision in which the dicta were reflected in the result. That case has been a source of confusion to the lower courts. Thus, the Circuit Court of Appeals for the Second Circuit felt that the *Marron* case required it to give a more restricted view to the prohibitions of the Fourth Amendment than that court had expounded in *United States* v. *Kirschenblatt, supra*, see *Go-Bart* v. *United States, sub nom., United States* v. *Gowen*, 40 F. 2d 593, only to find itself reversed here, *Go-Bart* v. *United States, supra*, partly on the authority of the *Kirschenblatt* decision which, after the *Marron* case it thought it must disown. The uncritical application of the right of search on arrest in the *Marron* case has surely been displaced by *Go-Bart Co.* v. *United States, supra*, and even more drastically by *United States* v. *Lefkowitz, supra*, unless one is to infer that an earlier case qualifies later decisions although these later decisions have explicitly confined the earlier decision.

As we have already pointed out, neither the Congress nor the circuit courts of appeal have so read the *Go-Bart* and *Lefkowitz* cases. But we turn to an independent examination of the suggestion made.

We think that the *Go-Bart* and *Lefkowitz* cases clearly dispose of the contention, which had earlier been rejected in *United States* v. *Kirschenblatt*, 16

F. 2d 202, *supra* pp. 24–25, that because the defendant's person may be searched consequent upon his arrest, and incriminating papers taken from him, it follows that the premises under his control may likewise be searched for similar documents. Cases holding the contrary we concede to have been wrongly decided under the *Go-Bart* and *Lefkowitz* opinions, which clearly condemn exploratory searches of the premises for papers which could not have been taken under authority of a search warrant.[17] Possibly, as we have suggested above, p. 38, there may still be room for exploratory searches where the crime is actually being committed in the presence of the arresting officers;[18] in the instant case we do not reach that problem. But, reading the Fourth Amendment, as we must, in the light of practices current at the time of its adoption,[19] we think it is clear that a search of premises incident to an arrest represented an existing and widespread practice which was entirely unaffected either by Lord Camden's ruling

[17] E. g., *Browne* v. *United States*, 290 Fed. 870 (C. C. A. 6); *Sagers* v. *United States*, 2 F. 2d 146 (C. C. A. 9); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2).

[18] E. g., *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3).

[19] See *Boyd* v. *United States*, 116 U. S. 616, 624–625; and see *Carroll* v. *United States*, 267 U. S. 132, 149: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

in *Entick* v. *Carrington*, 19 How. St. Tr. 1030 (1765) or by the limitations of American Constitutions, state and federal. Time has not permitted a complete examination of the actual records of cases reported in *Howell's State Trials* and in the *American State Trials*, but the sampling technique has revealed a sufficient number of instances to indicate that the practice in question was widespread.

Thus, at the *Trial of Patrick Hart* in 1796 (26 How. St. Tr. 388, 396), thirty years after the decision in *Entick* v. *Carrington*, an officer testified as follows:

> Received a warrant from alderman James, to apprehend the prisoner and several others, and accordingly went to the House where the prisoner lived—broke upon the street door with a sledge, went upstairs, found the prisoner and another boy in bed—took a paper, or parchment out of the prisoner's breeches pocket—knew they were his breeches, from his having told the witness so—they were not the breeches which the prisoner put on—found some parchment and papers in a box in the room—a broken blunderbuss, and about 20 rounds of ball cartridge—witness did not inquire whose the box was—nor did he know.

At the *Trial of Henry and John Sheares*, 27 How. St. Tr. 255, 321 (1798), an officer identified

papers found in a small writing box upon the table in the home of one of the defendants.

Some years later, in 1820, at the *Trial of Arthur Thistlewood*, 33 How. St. Tr. 682, 811–812, an officer was first asked whether he had found any persons who were afterwards taken into custody and subsequently was asked whether he had searched the room and what he had found.

At the *Trial of James Ings*, 33 How. St. Tr. 957, 1047 (1820), an officer testified to the arrest of two defendants and to a search of their entire lodgings.

Similar practices with respect to the search of premises [21] consequent upon an arrest are shown in the records of the earliest reported American cases.

In Massachusetts, in 1817, at the *Trial of Levi and Laban Kenniston* for robbery before the Supreme Judicial Court, 14 Am. St. Tr. 237, 244, the person allegedly robbed testified that he, together with officers, entered the home of the defendants, arrested them, and searched the entire premises for the stolen property.

The same practice was current in New York. At the *Trial of Richard P. Robinson*, 12 Am. St. Tr. 426, 446, before the Court of Oyer and Terminer in 1836, it appeared that the room of

[21] For an early case showing that the person arrested was regularly searched, see *Trial of Bathsheba Spooner et al.*, 2 Am. St. Tr. 175, 181 (Mass. Super. Ct. of Judicature, 1778).

the defendant was searched at the time of his arrest. Similarly, at the *Trial of John C. Colt* for murder in 1842, before the same tribunal, an officer testified as follows (4 Am. St. Tr. 455, 469):

> Am an officer. Arrested Mr. Colt. Found the hatchet under a lot of papers and a trunk placed over them, found a pail there, and the other things already described.

Search of the premises incident to an arrest was likewise the practice in North Carolina. At the *Trial of the Rev. George W. Caraway* in the Superior Court of Beaufort County in 1853, a deputy sheriff testified as follows (6 Am. St. Tr. 514, 533):

> * * * Had process in my hands against the prisoner after the body of Lassiter had been found, but could not find him. I looked for him on Monday and Tuesday, 22nd and 23rd November. Found a long double-barreled gun in Caraway's house, in his bed room. I drew the loads and examined them. Both barrels were loaded, one of them with buck shot.

It is to be noted that North Carolina had no statute authorizing the issuance of search warrants at that date. An act passed in 1868 (N. C. Laws of 1868–69, c. 178, sub-ch. 3, § 38), authorizing the issuance of warrants, was limited to warrants for stolen property, counterfeit notes, and instruments for producing counterfeit notes.

Again returning to New York, the record of the *Trial of Emma Cunningham* before the Court of Oyer and Terminer in 1857, 5 Am. St. Tr. 90, 123, contains the testimony of a policeman that he was present in the defendant's room "when it was searched by order of the coroner." We find nothing in the laws of New York at that period authorizing the coroner to direct a search. See 3 N. Y. Rev. Stat. (5th ed. 1859) p. 1036. Indeed, the right to issue warrants was limited to warrants to search for stolen property. 3 N. Y. Rev. Stat. (5th ed. 1859), p. 1040.

The reported decisions of American appellate courts prior to *Weeks* v. *United States* do not, for the most part, discuss the matter. Many of the early decisions involve only the right to search the person. *Ex parte Harn*, 92 Ala. 102 (1891); *Woolfolk* v. *State*, 81 Ga. 551, 562 (1888); *Reifsnyder* v. *Lee*, 44 Iowa 101 (1876); *Commercial Exchange Bank* v. *McLeod*, 65 Iowa 665 (1885); *Thatcher* v. *Weeks*, 79 Me. 547 (1887); *North* v. *People*, 139 Ill. 81, 107 (1891); *Stuart* v. *Harris*, 69 Ill. App. 668 (1897); *Holker* v. *Hennessey*, 141 Mo. 527 (1897); *Closson* v. *Morrison*, 47 N. H. 482 (1867); *Fogg* v. *Worster*, 49 N. H. 503 (1870); *O'Connor* v. *Bucklin*, 59 N. H. 589 (1879); *Spalding* v. *Preston*, 21 Vt. 9 (1848). It does not follow, however, that the only right of search incident to an arrest that was recognized in the period before 1900 was the right to search the person; for examination of these cases shows that almost

all involve an attempt to obtain money in the hands of the arresting officer, usually by way of execution by a third party. Money would be more likely to be taken in the search of a person rather than the search of the premises. The absence of earlier appellate opinions dealing with the right to search premises, therefore, does not warrant an inference that such right was unknown in our earlier history, particularly in view of the consistent practice reflected by the records of early criminal trials.

The other group of early appellate decisions in America involves the seizure without a warrant at the time of arrest of obvious fruits or instrumentalities of the crime, such as gambling devices or stolen property. *Newman* v. *People*, 23 Colo. 300, 310–311 (1896); *Kneeland* v. *Connally*, 70 Ga. 424 (1883); *Rusher* v. *State*, 94 Ga. 363 (1894); *State* v. *Robbins*, 124 Ind. 308 (1890); *Banks* v. *Farwell*, 21 Pick. 156 (Mass. 1838); *Houghton* v. *Bachman*, 47 Barb. 388 (N. Y. 1866). Some of these cases involved a search of premises to the extent that the accused, upon arrest, was questioned as to the location of stolen property, and after he had made known its location, the officers searched and seized the property. *Rusher* v. *State*, *Banks* v. *Farwell*, and *Houghton* v. *Bachman*, *supra*. In *Banks* v. *Farwell*, a Massachusetts case, the accused was arrested outside his shop, and when he stated that the stolen property was in the shop, the officer broke into the

premises without permission and seized the stolen chattel. The court upheld the officer's action under a statute passed in 1804 making it the duty of the "officer who shall be lawfully employed in apprehending and arresting any person accused of the crime of larceny, to seize and secure the money, goods or other articles alleged to be stolen which shall be found in the possession of such accused person." This decision, as well as that in *Houghton* v. *Bachman, supra*, does, however, contain language which seems to indicate that, while the officer would have a right to seize property where he knew its location, he would not have the right to search for concealed property.

The disparity between the virtually axiomatic acceptance of a right to search recognized in the *Weeks* case, and the absence of earlier appellate authorities in this country recognizing such a right additionally supports the view that the *Weeks* decision was giving recognition, not to reported decisions, but to an actual practice which was so much a part of the legal thinking of the time that it had never been the subject of controversy. There are indications, even apart from the earlier records of trial, that such was the case. In *Smith* v. *Jerome*, a decision in the Supreme Court of New York, 47 Misc. 22 (1905), the following broad language upholds the right of search incident to an arrest for a past crime (pp. 23–24):

> The police have the power and it is also their duty to search the person of one law-

> fully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. * * *

In *Getchell* v. *Page*, 103 Me. 387 (1908), similarly the court said (pp. 390–391):

> It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it. * * *

And in *United States* v. *Mills*, 185 Fed. 318 (C. C. S. D. N. Y. 1911), writ of error dismissed, 220 U. S. 549, Circuit Judge Lacombe remarked (185 Fed. at 319):

> From time immemorial an officer making a lawful arrest on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A blood-stained knife or garment,

> a half-emptied phial of poison, a mask or disguise, counterfeit coins, plates for printing counterfeit notes, gambling devices, stolen property, and many other articles are thus seized every day on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure.

Similar expressions appear in the leading Irish case of *Dillon* v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245, decided in 1887, which we deem appropriate to discuss at some length, not only because it is the only authority which considers with any particularity the rationale of the right to search premises incident to a lawful arrest, but also because it was cited and relied on by this Court when that right was recognized here in the *Weeks* and *Carroll cases*. 232 U. S. at 392; 267 U. S. at 158.

In *Dillon* v. *O'Brien*, the plaintiff, a Member of Parliament, had been arrested under a lawful warrant charging him with conspiracy, and the defendants, peace officers, seized books, papers, a telegram, gold and silver coins, and bank notes from the room and house in which the plaintiff was at the time of his arrest. The charge against the plaintiff was in due course dismissed for want of prosecution, after which he sued for, *inter alia*, an order for the return of the goods seized and damages for their detention. Defendants answered, alleging that the plaintiff was guilty of the offense charged and was arrested while actually committing it, and that the property seized

had been in use in the commission of the conspiracy. The case came before the Exchequer Division of the High Court of Justice in Ireland on plaintiff's demurrer to the answer.

Chief Baron Palles, for the court, first considered the contention that there was no right to seize evidence even in the case of a felony. As to this he said (20 L. R. Ir. at 314): [22]

> * * * * If, then, the right here claimed does not exist, even in treason and felony, it would follow that upon the arrest of a murderer caught in the act, and on the moment lawfully arrested, whilst the weapon with which the crime had been committed was in his hand, it would be illegal for the constable to detain that weapon for the purposes of evidence; so also would it be illegal for the officers of the law to take possession of poisons found in the possession of one who had caused death by poison; and, even in treason, letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor, would be safe from capture upon his arrest, although from the earliest times it has been the settled and unvarying practice to seize such proofs of guilt and give them in evidence at the trial.

After examining the authorities, the Lord Chief Baron held that the right did exist in cases of fel-

[22] We have used the report in 20 L. R. Ir., which is more complete than the one in 16 Cox C. C.

ony; that the only question was whether if extended to cases of misdemeanor; and that for this purpose it was necessary to examine the reason of the rule in felony, which the learned judge found to be the interest of the State in bringing guilty persons to justice. Said Palles, C. B. (20 L. R. Ir. at 316–318):

> I therefore treat it as clear and beyond doubt that, at least in cases of treason and felony, constables (and probably also private persons), are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime; and I take the only real question upon this defence as being, whether this right extends to cases of misdemeanour.
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> For this purpose I must first ascertain the reason of the rule as applicable to felony. The characteristic (by which felony is distinguished from misdemeanor) is that at common law the goods of the felon were forfeited upon conviction. The only right, however, to these goods which the books mention as being in the Crown before conviction, by reason of the possible future conviction, is that of taking (and detaining them for a reasonable time) *for the purpose of making an inventory.* Such a right has nothing in common with that of taking for the purpose of evidence. Forfeiture in felony, therefore, cannot be the origin of the

right. To what then, is it to be referred? Its purpose and object, viz. to produce in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. On the existence of this interest in the State, many of the most important principles of our jurisprudence depend. It is it which renders illegal an agreement to compromise a prosecution, whether for felony or (with one possible exception: *Keir* v. *Leeman*, 9 Q. B. 371) for misdemeanour. It is this, too, which prevents even a malicious prosecution against an innocent person constituting a cause of action, if there be reasonable and probable cause for its institution. The paramount nature of this interest is well illustrated by the power which, for the purpose of enforcing it, the law gives to the officer in whose custody a person charged with a crime lawfully is. There is no doubt that he may kill his prisoner in case of resistance, if he cannot otherwise secure his custody; and this as well when the charge is misdemeanour as felony. But the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. His custody is of no value if the

law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to product on or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture.

If material evidences of crime are in the possession of a third party, production can be enforced by the Crown, by *subpœna duces tecum*. But no such writ can be effective in the case of the person charged.

It appears to me to be clear that this must be the origin of the right in felony; and that, being derived from the common law, it ought, *prima facie* at least, to be deemed to exist in all cases in which that interest of the State exists, and cannot (at least without express authority) be so confined as to be inapplicable in cases of custodies of such value in the eyes of the law as to justify, for their preservation, the taking of life.

The case of *Entick* v. *Carrington* was distinguished as involving a warrant issued on mere suspicion, and not, as in the instant case, upon an allegation of guilt and a lawful apprehension. Palles, C. B., said on this point (20 L. R. Ir. at 318–319):

This brings me to the only case relied on by the plaintiff: *Entick* v. *Carrington*, 19 How St. Tr. 1029.[1] The question there was as to the legality of a warrant, not only to

seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was reasonable and probable cause for believing him to be guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone alse. The nature of the question there is shown by the statement of Lord Camden, *ibid.* 1063, 1064, that "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Lord Camden takes pains to show that the word "papers" in the warrant could not, in point of law, be restrained to libellous papers only; and he adds:—"All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer." It was of course, decided that that warrant was illegal; but the case, as a decision, is not in point here. The right here claimed is not to take all the

> plaintiff's papers, but those only which are evidence of his guilt; and the claim is based, not as in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt, and a lawful apprehension of the guilty person. If (by the law, as then understood) the right to seize evidences of guilt in the possession of the person charged was confined to cases of treason and felony, the judgment would have been rested on that simple ground; the care which was taken to show that the warrant embraced all papers would have been thrown away, and the entire of the elaborate judgment of Lord Camden would have been unnecessary. For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers.

While the offense for which the plaintiff in *Dillon* v. *O'Brien* was arrested was being committed in the presence of the arresting officers, the modern English law apparently does not rest the right of search incident to an arrest on that circumstance. Thus, in *Elias* v. *Pasmore*, [1934] 2 K. B. 164, damages were sought for the detention of documents seized on the premises in which the plaintiffs were arrested by the defendant police officers. No crime was being committed in the officers' presence. The court awarded

damages only in respect of the detention of documents which did not constitute evidence at the trials of the persons arrested, observing ([1934] 2 K. B. at 173)

> that the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by anyone, and that so far as the documents in this case fall into this category, the seizure of them is excused.[23]

All of the expressions quoted above, pp. 54–56, 57, together with the consistent practices reflected in the records of both English and American trials subsequent to *Entick* v. *Carrington*, indicate that a search of premises at the time of arrest was always considered outside the law relating to search warrants as such, and that while search warrants were deemed necessary where the search was used to establish probable cause to effect an arrest or to recover property without an arrest,[24] such considerations had no application

[23] Counsel for the plaintiffs, Sir Stafford Cripps, K. C., among them, cited *Entick* v. *Carrington* and *United States* v. *Lefkowitz*. This underscores the divergence between the modern English and American law with respect to exploratory searches of premises incident to a lawful arrest therein, as does the circumstance that *Dillon* v. *O'Brien* was discussed and relied upon in the Government's brief in the *Lefkowitz* case. U. S. Br. 21–24, No. 466, Oct. T. 1931.

[24] See the discussion in 2 Hale, *Pleas of the Crown* *114, regarding search warrants for stolen property: 74. But be-

where the offender had been identified and actually apprehended. This exception seems as well founded as the practice of searching the person upon arrest, which, whatever its origin (see Frankfurter, J., dissenting, in *Davis* v. *United States, supra,* pp. 12–13 of slip opinion), is certainly nowhere questioned at this time. It is to be noted that neither Hale nor Hawkins discusses search of the person any more than they mention search of the premises incident to an arrest, although the search of the person is admittedly ancient, extending well beyond the time of legal memory, and never questioned.[25]

We conclude, therefore, that the search of the premises occupied by an arrested person for contraband or for the fruits and instrumentalities of crime, as an incident to a lawful arrest, represents a historically well recognized right of law enforcement officers. It does not involve any erosion by imperceptible stages of constitutional protections; to the contrary, it marks a boundary between the rights of the individual and the rights

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cause the having of stolen goods in his custody is *prima facie* an evidence of a felony and a good cause of suspicion, it is a lawful clause in the warrant to attach the party, in whose custody they are found * * *."

[25] See 2 Hale, *Pleas of the Crown* 114–119, 2 Hawkins, *Pleas of the Crown* (6th ed. 1787) 137–139, dealing with the manner of executing warrants of arrest. The search of the person of the arrested individual was common practice. See *Trial of Francis De la Motte*, 21 How. St. Tr. 687, 738 (1781); *Trial of Thomas Kennedy*, 26 How. St. Tr. 354, 370 (1796). And see note 21, *supra*, p. 50.

of the community which has been clearly and recognizably indented for many years.[26]

While the precise historical origin of the right of search here in question may be obscure, the ready acceptance which the courts and the Congress have accorded the principle that a lawful arrest confers upon the arresting officers the right to search the premises under the control of the person arrested indicates that such a doctrine has not shocked the sensibilities of the bar, of the bench, or of the legislature. Such a right has not appeared to them to be an unreasonable one, violative of the spirit of the Fourth Amendment.

It is to be noted that a search of the premises under the control of the person arrested at the time of his arrest involves none of the evils of a general warrant condemned in *Entick* v. *Carrington* and prohibited by the Fourth Amendment. A search incident to an arrest is limited to one particular place, to one particular time, and to particular objects, i. e., the instrumentalities of the crime for which the person is arrested. The existence of probable cause for the search must

[26] The records of trials discussed above, pp. 49–52, contain indications which support the historical correctness of the present English view (see *Elias* v. *Pasmore*, [1934] 2 K. B. 164, *supra*) that the right to search premises incidental to a lawful arrest is broad enough to include a general exploratory search for any incriminating evidence. But, in view of the *Go-Bart* and *Lefkowitz* cases, we do not suggest that such broad searches would be legal in this country, except possibly where the crime is actually being committed in the presence of the arresting officers. See pp. 38–39, *supra*.

be established either by a warrant of arrest or by facts which are sufficient to withstand judicial scrutiny if the arrest is made without a warrant. There is thus no possibility that a search incident to an arrest can be extended to cover a general search for evidence on the basis of mere suspicion—the type of search which the Fourth Amendment intended to prohibit.

The practical justification for a search incident to an arrest is readily apparent as applied to situations where a crime is being committed in the presence of the arresting officer. For example, where an officer comes upon a person selling narcotics, it is certainly reasonable for him to search for additional narcotics that may be hidden in a cabinet or bureau drawer in the same or an adjoining room. Such practical justification does not necessarily disappear because the offense has been completed. Where the arrest is made shortly after the crime has been committed at the very place of its commission, as in *United States* v. *Lindenfeld*, 142 F. 2d 829, certiorari denied, 322 U. S. 761, where the arrest was made immediately after a government informer had received a prescription for narcotics from the defendant, it is not unreasonable to allow the officer to search the place where the offense has been committed for the instrumentalities of the crime. So, too, an officer who pursues a murderer and finds him in his home would, we submit, be amply justified in searching

his apartment for the murder weapon if it was not found upon his person.

Where, as in this case, the arrest is made some time after the offense has been completed, at a place other than that where the crime was committed, the right to search premises incident to an arrest for a crime long since past becomes of practical importance when the fruits or instrumentalities of the crime, while generally known, are not so identified as to be described with the specificity required of search warrants. But this circumstance does not render the search unreasonable. It must be remembered that the entry, the breach of the castle wall of the home if the arrest is made at home, is lawfully made,[27] either on a judicial finding or on facts which can withstand judicial scrutiny showing that a crime has been committed and that there is reasonable cause to believe that the person arrested is the offender. The nature of the objects sought must have a reasonable relation to the crime charged. It would, we think, be wholly unreasonable to hold that under such circumstances the home of a suspected murderer may not be searched for the lethal weapon or the bloody clothes of his victim simply because the arresting officers may not know their exact nature. Cf. *Morton* v. *United States*, 147 F. 2d

[27] Distinguish the situation where the police have no right to enter the home. *Nuslein* v. *District of Columbia*, 73 App. D. C. 85, 115 F. 2d 690.

28, 30 (App. D. C.), certiorari denied, 324 U. S. 875. We submit that it would be similarly unreasonable to hold that where, as here, police have already shown to a judicial officer that there is reasonable cause to believe that a defendant has committed mail fraud by mailing forged checks, and the officers have made a lawful entry into a defendant's house or office for the purpose of arresting him for that offense, they may not examine his bureau drawers as well as his trouser pockets to find the forged checks. Certainly there is nothing in the Fourth Amendment, nor in its origins or in the line of its growth (cf. *Gompers* v. *United States*, 233 U. S. 604, 610) which affords more protection to the furniture of a defendant than to his person.

Having regard to the consistent practice which for well over a century has sanctioned reasonable searches of a defendant's premises for instrumentalities of crime incident to his lawful arrest for that crime, both in England where *Entick* v. *Carrington* is unquestioned authority, and in this country where the effect of that great judicial landmark is preserved by the Fourth Amendment and by analogous provisions in the constitutions of the several states, having regard also to the many decisions which uphold that practice, in this Court and elsewhere, we submit that such searches are, as they have been recognized to be, consistent with the Constitution.

II

THE SEARCH WAS NOT A GENERAL EXPLORATORY SEARCH FOR EVIDENCE OF CRIME

Petitioner contends (Pet. 4, 14–15, 15–21, 26–28) that the search in the instant case was an "unlimited, ransacking search of [his] home as an incident of his lawful arrest for the purpose of discovering and seizing evidence of his guilt." The court below found this assertion to be without support in the record (R. 149). Recognizing that "general exploratory searches for the purpose of uncovering evidence of crime, or for obtaining information, either with or without a search warrant [are] unreasonable" (R. 147), the court rejected petitioner's contention, saying (R. 149–150):

> * * * The officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest. The incidental and contemporaneous search was thorough—it was as thorough as its nature required, but the reasonableness of a search is not necessarily to be judged by its thoroughness, so long as it has a reasonable relationship to its object. [Petitioner] was arrested for offenses involving the forgery of a $25,000 check drawn on the Mudge Oil Company and signed by designated officers, and the testimony in this case is to the effect that the officers were looking for two $10,000 cancelled checks which had been stolen from the offices of the Mudge Oil Company, and which the officers had good reason to

believe had been used as a part of the means for forging the $25,000 check.' The avowed purpose of the search was for the means by which the crime was committed and it extended no further and was no more extensive than necessary to uncover the articles sought. It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot, and it is not unlikely or unreasonable to assume that they would be found encased in an envelope where the draft cards and certificates were in fact discovered.

To be sure, the authority to search for the fruits or the means of the offense as an incident to the lawful arrest, like all prerogatives based on reason, is susceptible to oppressive abuse. The authority must be confined to narrow limits and utmost good faith exacted. Courts must exercise care lest we unwittingly sanction an evidential exploration under the guise of a declared legitimate purpose. The restraint can best be imposed by an inquiry into the bona fides of the declared purposes of the search and the trial court is the first and best judge of whether the challenged search was reasonably incident to its permissible purposes.

When the search was challenged in this case, the trial court conducted an extensive inquiry concerning its purposes and scope, and based upon all of the evidence concluded that the search and seizure was not unreasonable. While it is also our duty to

> exercise circumspection for the constitutional rights of the one accused of crime, we must accord to the trial court the primary responsibility of balancing orderly and efficient enforcement of the criminal laws against the constitutional rights of those charged with crime. When judged by these standards, we are unable to say that the search for the fruits and means of the crime charged as an incident to the lawful arrest therefor was unreasonable under the attendant circumstances.

Petitioner assails (Pet. 17–21, 26–28) the correctness of the conclusion reached by the circuit court of appeals that the "officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest." He states that if the real purpose of the officers in entering his home was to arrest him, "they had completed their mission" when they arrested him, so that, presumably, the search had no relation to the entry; that he was never indicted for the offenses which formed the basis of the arrest; and that the officers after embarking on the search procured a warrant to search his automobile on an assertedly inadequate affidavit. All of this is referred to apparently for the purpose of supporting the contention that the search was a general exploratory search for evidence. General exploratory searches made to find evidence of an accused's guilt of crime are unreasonable under the ruling in *United States* v. *Lefkowitz*, 285 U. S. 452, 465.

Nor may an arrest be "used as a pretext to search for evidence." *United States* v. *Lefkowitz, supra,* 285 U. S. at 467. The testimony of the agents as to the objects of the search was that they were looking for the tools which petitioner had used in his "confidence game," specifically for checks, writing materials, and burglar tools (pp. 6–7, *supra*). We submit that these were proper objects of a search as the instrumentalities or means of committing the offenses involved.

That the two $10,000 canceled checks and the burglar's tools were properly sought for is not, we submit, open to serious question. Petitioner was alleged to have sent through the mails on March 7, 1944, a forged $25,000 check purportedly to have been made by the Mudge Oil Company (*supra,* p. 5). There was evidence tending to show that on the previous evening petitioner had opened the locked door of the company's office and abstracted from it two of the company's canceled checks (p. 6, *supra*). It is clear that petitioner could have used these in order to forge the $25,000 check. Plainly, the agents were entitled to look for the "tools" by which petitioner might have opened the entrance to the company's office. In respect of the pens and writing materials,[25] it is, we believe, not unreasonable to regard

[25] The agents testified that they seized seven or eight pens (p. 7, *supra*). Petitioner in his motion to suppress alleged that the agents also seized a quantity of blank stationery and bills (pp. 7–8, *supra*). It is true that the Government

them as "a part of the * * * equipment actually used to commit the offense." *Marron* v. *United States*, 275 U. S. 192, 199. Certainly the pens and writing materials here were more closely related to the commission of the forgery in connection with which petitioner here was arrested than were the ledger and the bills for past utility services to the maintenance of a speakeasy in the *Marron* case, the crime there involved.

The fact that the officers here proceeded to make a search of the apartment after they had already effected petitioner's arrest is far from proving that their object in entering the apartment was a search rather than to execute the warrants. The sequence of events establishes the contrary. And since the officers were empowered to search as incident to the lawful arrest, the fact that they intended to do what the law authorized obviously cannot make their entry unlawful.

Nor did the entry and search become unlawful because, during the course of the search the officers obtained a warrant to search petitioner's automobile and office upon an affidavit which might have been inadequate for that purpose or as the basis for a warrant to search petitioner's apartment because the ground of the agent's belief was not set forth in sufficient detail. Assum-

did not deny these allegations. But petitioner's affidavit was not subjected to cross-examination, while the agents were.

ing here that that affidavit did not state the grounds of their belief in sufficient detail (cf. *Byars* v. *United States,* 273 U. S. 28; *Grau* v. *United States,* 287 U. S. 124), it does not follow that the agents did not have probable cause for belief that petitioner had committed the offense and had the offending articles in his possession. The agents had, in obtaining the warrant of arrest, already established to the satisfaction of a judicial officer that they had probable cause to believe he had committed the offense.

Indeed, the circumstance that the officers sought a warrant for the search of petitioner's automobile and office reflects their good faith. Under the decisions set out and discussed at length above, pp. 20–25, they needed no warrant to search the apartment for the instrumentalities of petitioner's crime other than the warrant for his arrest. But, under the ruling in *Agnello* v. *United States,* 269 U. S. 20, discussed *supra,* pp. 23–24, they could not search for instrumentalities of crime beyond the premises on which the arrest took place. Had they disregarded the command of the *Agnello* case and searched petitioner's office and automobile without undertaking to procure a warrant, they might well have been culpable; instead, they took steps to remain within the limits of the decided cases.

It does not appear from the record whether petitioner was or was not tried for the offense for which he was arrested. But even if the record

affirmatively established that he was not so tried, that fact would not stamp the search as one for evidence of crime. Obviously, a search incident to an arrest, having as its object the instrumentalities of the crime, is not transformed into a prohibited search for evidence of crime by virtue of the fact that a prosecution for the offense for which the arrest is made does not ensue. Cf. *Dillon* v. *O'Brien, supra.* Witnesses may have died or disappeared. It may well be that an accused is able to secrete successfully in his home stolen property which is the object of a valid search. The failure to find the property may make a prosecution unavailing. It is certainly not to be supposed that the validity of the search in such a case is to be measured by its success or otherwise in uncovering what was sought.

To support his contention that the search was a prohibited exploratory search for evidence of his guilt of crime, petitioner refers to it as having been an "unlimited ransacking" of his home (Pet. 15), and as a search "in every nook and corner." That the search was thorough may be conceded; that it was an "unlimited ransacking" of the apartment is not supported by the record. Under the circumstances, the search was necessarily thorough, and, as the court below pointed out, "the reasonableness of a search is not necessarily to be judged by its thoroughness. * * * The avowed purpose of the search was for the means by which the crime was committed and it ex-

tended no further and was no more extensive than necessary to uncover the articles sought. It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot, and it is not unlikely or unreasonable to assume that they would be found encased in an envelope where the draft cards and certificates were in fact discovered" (R. 149–150). While the court below considered the object of the search to be only the canceled checks, the record shows that the agents, in addition, were searching for burglar's tools, pens, and writing materials (pp. 6–7, *supra*).

The burglars' tools, like the checks, would probably not have been in open view; the pens and the writing materials may or may not have been. The decided cases indicate, on closer analysis, that neither the lawfulness of the search nor that of the seizure turns on whether the articles taken were in plain view.[29] In either event, the pens and writing

[29] The ledger in the *Marron* case was in a locked closet. See note 13, *supra*, p. 33. Yet it was later referred to by this Court as having been "visible" (282 U. S. at 358) and "in plain view" (285 U. S. at 465). Contrariwise, some of the papers taken in the *Lefkowitz* case were in waste-baskets (285 U. S. at 460), from which they were taken and later pasted together, yet both the search and the seizure were condemned. And compare *Furlong* v. *United States*, 10 F. 2d 492 (C. C. A. 8), which upheld the seizure of a marked bill taken from the closed drawer of a cash register.

materials were subject to seizure; they were, as previously stated (*supra*, pp. 72–73), a part of the outfit used to forge the $25,000 check, so that, even if their seizure resulted from a search they were, for the same reason, the proper objects of a search.

This Court observed in the *Go-Bart* case (282 U. S. at 357), "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

If the officers here had been searching for an automobile, stolen and transported in violation of the National Motor Vehicle Theft Act (18 U. S. C. 408), it would obviously have been unreasonable for them to have searched defendant's bureau drawers. The same must be said of a search for an unregistered still, possessed in violation of 26 U. S. C. 2810 (a). But where, for instance, the search is carried on for plates used to counterfeit government obligations (18 U. S. C. 264, 267), articles more easily concealed, the number of likely hiding places is greater, and the scope of a reasonable search is accordingly wider. When the articles sought to be uncovered are even smaller—counterfeit silver coins (18 U. S. C. 277), gold coins of any sort (31 U. S. C. 443), opium or other narcotics (26 U. S. C. 3224 (c); 21 U. S. C. 174)—a search to avail at all must be even more thorough. And when the object of the quest is, for example, smuggled diamonds

(19 U. S. C. 1593), then even a search as painstaking as the one disclosed by this record might well be wholly inadequate. In any event, a search otherwise reasonable does not merit constitutional condemnation simply because it is thorough. A search predestined to failure is not the only one that satisfies the Fourth Amendment.

In summary, we submit that the search here was not unlawful as a quest for evidence of guilt. The avowed objects of the present search were instrumentalities of the crimes for which petitioner was arrested or the means of committing those crimes, and the nature of most of them was such that they could not be discovered without a thorough examination of the apartment. Cf. *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2).

III

THE SEARCH WAS NOT IMPROPER BECAUSE IT EXTENDED BEYOND THE PRECISE PORTION OF THE PREMISES WHERE PETITIONER WAS ARRESTED

Petitioner contends (Pet. 4, 15, 21–26) that when he was arrested the search could only extend to "whatever [was] found upon his person and in his immediate control." Under this head, petitioner devotes himself to an attack upon the statement in the opinion below that "when a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense, may be seized and held as

evidence in a prosecution against him" (R. 147–148). Petitioner discusses each of the cases cited in the opinion to support this statement, and concludes that the statement must be modified by inserting before the word "control," the word "immediate." Just how the modification sought affects the case, petitioner does not state. We will here assume that petitioner's contention, in effect, is that where the arrest takes place in a room in an apartment, any search must be limited to that room and may not be extended to other rooms of the apartment. Here, petitioner was arrested in the living room of his apartment, and the search covered that room and the other three rooms of the apartment (p. 7, *supra*).

The cases in this Court indicate that, if the search is otherwise lawful, it may extend to the entire premises under the control of the arrested person. Thus, in the *Agnello* case, the Court said that incident to a lawful arrest there was the right "to search the place where the arrest is made." 269 U. S. at 30. The premises there consisted of four rooms, and the agent testified that he "searched all around the place."* That portion of the search was held lawful; the search of premises other than those on which the arrest took place was held unreasonable. See pp. 23–24, *supra*. Similarly, in the *Marron* case, in speaking of searches incident to a lawful arrest, the

* R. 61, 219; No. 6, Oct. T. 1925.

Court said that the officers had the right to search "the place"; that while the ledger was not on the prisoner's person "at the time of his arrest, it was in his immediate possession and control"; and that the officers' authority to search "extended to all parts of the premises used for the unlawful purpose." 275 U. S. at 199. The premises involved in the *Marron* case consisted of six or seven rooms,[31] and the agents testified that they made a thorough search of the entire premises.[32]

In the *Go-Bart* case, 282 U. S. 344, the search extended to the three rooms of the suite occupied by the petitioners, and in *United States v. Lefkowitz*, 285 U. S. 452, the premises searched consisted of a single room divided into two portions by a partition. In each of these cases the search was held to be unreasonable, basically for the reason that it was exploratory in nature, seeking only generally incriminatory papers. Neither decision suggests that the area searched was too extensive, or that the search, otherwise reasonable, became unreasonable because more than one room was examined by the officers.

The circuit courts of appeal, accordingly, have assumed without discussion that the area of search is not limited merely to the room in which the

[31] R. 93, 119, 132, 137–138; No. 185, Oct. T. 1927.
[32] R. 92, 133, 137; No. 185, Oct. T. 1927.

arrest is made.[33] And while some of these decisions are not law today because they involve the species of exploratory searches condemned by the *Go-Bart* and *Lefkowitz* rulings,[34] they are in accord with the decisions of this Court as to the portions of the premises which the arresting officers may examine. As the Ninth Circuit said in the *Sayers* case (2 F. 2d at 147): "* * * if taken in commission of the crime in a building, the latter may be * * * searched to the extent that the offender's control and activities likely extended."

We think the rationale of the cases is that the premises under the arrested person's control may be searched because of the likelihood that he has there secreted the fruits and/or the instrumentalities of his crime. If he is arrested in a hotel room, that does not open to search all the other rooms of the hotel; they were not under his control. For the same reason, arrest of the defendant in his apartment does not subject to scrutiny

[33] E. g., *Swan* v. *United States*, 295 Fed. 921 (App. D. C.); *Sayers* v. *United States*, 2 F. 2d 146 (C. C. A. 9); *Marron* v. *United States*, 8 F. 2d 251 (C. C. A. 9); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2); *Shelton* v. *United States*, 50 F. 2d 405 (C. C. A. 7); *United States* v. *71.41 Ounces Gold Filled Scrap*, 94 F. 2d 17 (C. C. A. 2); *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3); *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2); *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761.

[34] E. g., *Sayers* v. *United States*, 2 F. 2d 146 (C. C. A. 9); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 9); cf. *Marron* v. *United States*, 8 F. 2d 251 (C. C. A. 9).

all the rest of the apartment house. But it does, we submit, render liable to search every room in his own apartment, and every room in his house if he occupies a detached dwelling. Certainly it would be highly artificial to restrict the area of the search to the particular portion of the premises where the arrest chances to take place.

Suppose that federal officers, armed with a warrant for the defendant's arrest on a charge of having stolen government property in his possession, are admitted by defendant's wife and arrest him in the kitchen.[*] We do not believe that in such a case the search, otherwise proper, must be limited to the kitchen. Or suppose that the defendant is arrested in the bathroom, or even in a clothes closet in which he had concealed himself; it certainly can not follow that only the bathroom or the closet may then be searched for the instrumentalities of his offense.

We submit, therefore, that, whenever a search of premises is permissible, such search manifestly extends to all portions of the premises under the control of the person arrested. In the present case the search did not extend beyond those portions. Hence it was reasonable, proper, and not an unwarranted extension of the right to search incident to a lawful arrest.

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[*] Distinguish the situation where the search precedes the defendant's entry and arrest. *United States* v. *Deegan*, 66 F. Supp. 511 (S. D. N. Y.).

IV

THE SEIZURE OF THE SELECTIVE SERVICE DOCUMENTS AND THEIR INTRODUCTION IN EVIDENCE WERE PROPER

The final question in the case is whether the agents were authorized to seize the eight Notice of Classification cards and the eleven Registration Certificates, petitioner's possession of which formed the basis of his conviction in the present case. The agents were not searching for these documents. They did not know when they embarked on the search that petitioner had the documents in his possession (R. 75–76, 85). Petitioner contends (Pet. 4–5, 15, 28–37, 38–40) that even if the search was proper, the seizure of the selective service documents was improper on the theory that a seizure must be limited to the offense for which the arrest is made and may not extend to articles accidentally discovered during the course of the search. We submit that the contention is without merit in so far as it relates to the seizure here involved.

There can be no doubt that it was unlawful for petitioner to have these documents in his possession. The Notice of Classification cards bore a stamped legend which it was improper for them to bear (R. 50–51, 133). Under the applicable Selective Service Regulation (Appendix, p. 94, *infra*), it was unlawful for petitioner to have these cards in his possession. As to the Registration Certificates, it is not disputed that they were

stolen government property. We submit that it was plainly proper for the agents to take the documents. As Mr. Justice Frankfurter stated in his dissent in *Zap* v. *United States*, No. 489, Oct. T. 1945, decided June 10, 1946 (dissent, slip opinion, p. 2):

> If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized.[36]

This view is supported by the decisions of this Court. *Steele v. United States (No. 1)*, 267 U. S. 498; see *Adams* v. *New York*, 192 U. S. 585, 598; cf. *Gouled* v. *United States*, 255 U. S. 298, 311-312; *Zap* v. *United States*, No. 489, Oct. T. 1945, decided June 10, 1946.

Thus, in *Steele* v. *United States* (*No. 1*), 267 U. S. 498, a search warrant authorized search of the premises for a number of cases believed to contain whiskey. Search disclosed, and the agents seized, not only 150 cases of whiskey, but also 92 kegs of whiskey, a 5-gallon can of alcohol, 66 cases of gin, six 5-gallon jugs of whiskey, 102 quarts of whiskey, two 50-gallon barrels of whiskey, and a corking machine. This Court held that the property was lawfully seized, and affirmed a decree holding that it should not be returned.

[36] Mr. Justice Frankfurter went on to state that it was an entirely different proposition "to seize for evidentiary use papers the possession of which involves no infringement of law."

Earlier, in *Adams* v. *New York, supra;* the Court had recognized the same principle. It said (192 U. S. at 598):

> The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.[27]

Accordingly, it has been consistently held by the lower federal courts that where officers in the

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[27] *Marron* v. *United States*, 275 U. S. 192, is not to the contrary. There officers entered the premises under a search warrant authorizing them to search for liquor. In the course of their search, they took a ledger and some bills,

course of a lawful investigation come upon instrumentalities of a wholly different crime, such articles may also be seized. *Bennett* v. *United States*, 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788 (search warrant for counterfeiting apparatus justifies seizure of counterfeit ration coupons); *In re 14 East 17th Street*, 65 F. 2d 289 (C. C. A. 2) (smuggled goods discovered after entry by consent); *Paper* v. *United States*, 53 F. 2d 184 (C. C. A. 4) (liquor found during search for defendant whose arrest was sought on a bench warrant); *United States* v. *Two Soaking Units*, 48 F. 2d 107 (C. C. A. 2), certiorari denied, 284 U. S. 627 (contraband discovered during lawful inspection); *Hilsinger* v. *United States*, 2 F. 2d 241 (C. C. A. 6), certiorari denied, 266 U. S. 622 (same); *United States* v. *Jankowski*, 28 F. 2d 800 (C. C. A. 2) (liquor found in car being stopped to notify driver to fix headlights); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736 (C. C. A. 2) (seizure of 4867½ cases of various kinds of intoxicating liquor held proper under search warrant for 10 or 12 barrels of intoxicating liquor); *Milam* v. *United States*, 296 Fed. 629 (C. C. A. 4), certiorari denied, 265 U. S. 586 (aliens unlawfully in U. S. discovered in truck

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articles not in themselves offending. While the seizure of these papers was held to be not justified *under the warrant* (275 U. S. at 196, quoted *supra*, note 12, pp. 26-27), the seizure was found proper as incident to a lawful arrest for a crime then being committed on the premises. 275 U. S. at 198-199.

stopped on reasonable belief it was carrying liquor); *United States* v. *Charles*, 8 F. 2d 302 (N. D. Calif.) (liquor seized in course of search for narcotics); *United States* v. *Seltzer*, 5 F. 2d 364 (D. Mass.) (counterfeit bond strip label stamps seized in search for liquor); *United States* v. *Camarota*, 278 Fed. 388 (S. D. Calif.) (still seized in search for liquor).

The rationale of all these decisions is succinctly set out in expressions from but two of them. In the case of *United States* v. *Old Dominion Warehouse*, *supra*, Judge Learned Hand said (10 F. 2d at 738):

> If we suppose the case of goods which we are more used to thinking of as inherently contraband, like a burglar's kit, or counterfeiting paraphernalia, the case appears to us plain. We cannot suppose that, if an officer entered lawfully upon a warrant limited to certain described articles of this kind, he would not be justified in taking without warrant any others which he might chance upon in the premises. His seizure would not depend upon the warrant, but upon the fact that they were in their nature caput lupi; it would be as little an "unreasonable seizure" as to take property from a person arrested.

And in *Paper* v. *United States*, *supra*, Judge Parker for the Fourth Circuit stated the reasons as follows (53 F. 2d at 184–185):

We think there can be no question but that the evidence was admissible. The purpose of the Fourth Amendment was to prevent the use of "governmental force" to search a man's house, his person, his papers or his effects and to prevent their seizure against his will. *Olmstead* v. *U. S.*, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376. Most cases of search in violation of this constitutional provision involve the element of trespass, i. e. the entry without right upon the premises of the citizen. And all cases of unlawful search will be found to involve either this element or some element of fraud or subterfuge, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. *Henderson* v. *U. S.* (C. C. A. 4th) (12 F. (2d) 528, 51 A. L. R. 420; *Thompson* v. *U. S.* (C. C. A. 4th) 22 F. (2d) 134. But where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers, in this case, had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?

* * * * *

In this case the officers had the right to go upon the defendant's premises for the purpose of finding and arresting him. While lawfully there and searching for him in good faith for the purpose of making the arrest, and not as a pretext for searching the premises for evidence of crime, they discovered that a crime was being committed in their presence. This discovery did not render their search unreasonable or unlawful; and there is no reason in law or in common sense why their testimony as to the crime whose commission they discovered should be excluded. Courts should be careful to safeguard the constitutional rights of the citizen against unlawful infringement by overzealous officers of the law; but, where officers are proceeding lawfully, there is no constitutional principle which forbids their testifying to a violation of law which they observe. The purpose of the Fourth Amendment is not to shield crime, but to protect the citizen against the improper use of governmental force. If there is no such improper use of force, the amendment has no application.

It would indeed be a perversion of the law to hold that officers, while legally searching as incident to an arrest, may not seize unquestioned contraband property unexpectedly uncovered by their search. And, since the documents were lawfully obtained, they could, of course, be used to prosecute petitioner for an offense unrelated to that

upon which the search was founded. Cf. *Gouled v. United States*, 255 U. S. 298, 311–312.

CONCLUSION

The search here was a proper incident of a lawful arrest. It was not merely exploratory. In the circumstances it was reasonable, both as to purpose and scope. And the contraband articles it uncovered were properly seized even though otherwise unrelated to the crimes for which petitioner was arrested or to the articles for which search was made.

Accordingly, we respectfully submit that the judgment below should be affirmed.

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DECEMBER 1946.

APPENDIX

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Search Warrant Act, Title XI of the Espionage Act of June 15, 1917, C. 30, 40 Stat. 228, 18 U. S. C. 611 *et seq.*, provides in pertinent part as follows:

> Sec. 2. A search warrant may be issued under this title upon either of the following grounds:
>
> 1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.
>
> 2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

Section 48 of the Criminal Code (18 U. S. C. 101) is as follows:

> Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has heretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is

> directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 3 of the National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, as amended by the Act of August 3, 1939, c. 413, § 1, 53 Stat. 1178 (18 U. S. C. 415) reads in pertinent part as follows:

> * * * whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894–895 (50 U. S. C. App. 311), provides in pertinent part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

Section 623.61–2 of the Selective Service Regulations (7 F. R. 9773) reads as follows:

> It shall be a violation of these regulations for any person to have in his possession a Notice of Classification (Form 57) issued to some other person, or to permit a Notice of Classification (Form 57) issued to him to be in the possession of any other person, except as provided in the instructions upon such forms; or to falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or to willingly aid or assist another to falsely make, alter, forge, or counterfeit, any Notice of Classification (Form 57); or to utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, altered, forged, or counterfeited Notice of Classification (Form 57); or to exhibit or present to any person any such false, altered, forged, or counterfeited Notice of Classification (Form 57) knowing the same to be false, forged, altered, or counterfeited.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 34.

GEORGE HARRIS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING.

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THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING.

To the Honorable Fred N. Vinson, Chief Justice of the United States, and the Associate Justices of the United States:

The petition of George Harris respectfully submits that he has been aggrieved by an opinion of the majority of your Honors rendered herein on the 5th day of May 1947 in the respects hereinafter set forth and prays for a rehearing of said matter. Your petitioner incorporates said opinions herein by reference. This Petition for Rehearing is filed within twenty-five days after the entry of judgment herein.

I

Petitioner's counsel realizes the entire Court has considered every case and precedent heretofore considered by

the Supreme Court of the United States, either in the opinion of the majority or the opinions of dissent. The majority of the Court seeks to justify their conclusion on certain citations of other decisions that we feel are not applicable. The majority opinion leans heavily on the majority opinion in the case of *Davis v. United States*, 328 U. S. 582. The basis of the Davis holding is substantially that the Trial Court held that the defendant therein was persuaded to turn the questionable evidence over to some officers and therefore consented to the search and seizure. There were questions of facts involved in the Davis case that were not in the Harris case. The facts in the Davis case were disputed. In the Harris case, there is no dispute as to the facts; the petitioner was handcuffed, in his own apartment, at the point of a gun, his apartment ransacked from top to bottom and his sealed envelopes opened, contents seized, confiscated and appropriated to the use of the Government in the subsequent prosecution.

The majority opinion simply arrives at the conclusion that Harris was guilty of possessing some blank draft cards that belonged to the Government. Nothing is said about whose property the sealed envelopes were.

For to say the possession of these worthless blank draft cards, with no intrinsic value, is the commission of a continuing crime in the presence of the investigators, is to carry a principle of criminal law to a greater extent than this Court has ever gone. It is fundamental and elementary that criminal laws are strictly construed. This Court has so announced in many cases that are all too familiar to this Court as to call for such citations.

The documents under discussion were seized without consent and under no legal process. This Court cannot say that they were taken incident to a lawful arrest, for the crime charged in the warrant as issued by the United States Commissioner at Oklahoma City. The papers taken were not the fruits of the crime for which Harris was arrested nor were they the means for the commission of the crime for which his home was raided.

If the Harris conviction is to stand, this Court should, after a future hearing, in a future opinion, definitely and candidly, overrule and set aside its decisions in the case of *Go-Bart Co. v. United States*, 282 U. S. 344 and *U. S. v. Lefkowitz*, 285 U. S. 452, in order that the precedents be consistent and inferior courts be properly guided, thereby laying down a rule of law that every Federal Bureau of Investigation agent having a warrant of arrest, in executing that warrant of arrest, may enter a man's home, make an exhaustive search and obtain anything that might be the basis of a criminal charge.

The Court, for future guidance, should definitely state that under the Fourth Amendment to the Constitution, the right to search and seize is as great or greater than under a legally issued search warrant; and the right to search and seize is, without restriction or restraint upon arresting officers with a warrant of arrest, valid under the Fourth Amendment.

One significant fact of the arrest in the Harris case was that it was made by five Federal Bureau of Investigation agents, not by the regularly appointed United States Marshal or his deputies, who make 99% of arrests when warrants are issued. Five agents to arrest one man, no, five agents to tear up a home to see what they may find, without one cent of financial responsibility for their actions. All in the name of law and order. Today it is Harris' home; tomorrow it may be your home and mine.

A search warrant could have been obtained. The law could have been observed and the majority of this Court would not have been obliged to temporize the fundamental law of this land to bring about the incarceration of one individual, as did the United States Circuit Court of Appeals for the 10th Circuit. We cannot go on singing "How Firm the Foundation" when crevices large enough for the masses to fall through are made by uncertain decisions. The Fourth Amendment to the Constitution is either permanent or not permanent. The majority opinion temporizes a cer-

tain state of facts; to the world that individual may not be so important, but to the citizens as a whole the sanctity of the home is what the founders of this Country fought, bled and died for, and the same brand of people, when a Government becomes oppressive, will do so again.

A young graduate lawyer Federal Bureau of Investigation Agent may feel free and unrestrained in his actions in making an arrest and investigation under the facts set out in the majority opinion, to say nothing of the uninformed average city police officer, who, in raiding the premises of citizens, could maliciously and unsuspectingly place contraband in the home of anyone raided, be it a blank draft registration card, a counterfeit dollar bill, morphine without the container having affixed thereon a stamp tax, non-tax-paid whiskey and a thousand other items all too familiar to anyone who has been in a law enforcement agency, who would be inclined to search and seize with a vengeance.

The majority opinion in its conclusions states, "The danger to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusionary. This Court has always been alert to protect against such abuse." In other words, citizens are advised, "Don't cross the bridge until you come to it", which was good advice in the School of Salerno. Does this mean that in each instance a citizen whose home as been invaded must run the gauntlet through the United States Commissioner's Court, the United States District Court, the United States Circuit Court of Appeals and then to the Supreme Court of the United States, before he gets the conclusive answer as to what rights he has under the Fourth Amendment to the Constitution? We, who are familiar with the intricacies of such endeavor, would rather say, "Hold the fleet angel fast until he bless thee."

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The law as laid down in the Harris case is prejudicial to the rights of every citizen; and the Constitution in an important age-old amendment has been temporized to a degree of invalidating that Amendment. It has been said, "The injustice to an individual is sometimes of service to the public. Facts are apt to alarm us more than the most dangerous principle".

On such excursions by the investigators under discussion and the facts set out in the opinions of this Honorable Court and if such invasions by officers are to be permitted, the Constitution is openly invaded, the primary rights of the citizens, from which all laws derive their authority, is directly attacked, and should not be passed unobserved.

It is commonly quoted, "Eternal vigilance is the price of liberty," but the quotation in full is: "It is the common fate of the indolent to see their rights become a prey to the active. The conditions upon which God hath given liberty to man is eternal vigilance; which condition, if he break, servitude is at once the consequence of his crime and the punishment of his guilt". As quoted from The Letters of Junius, "One precedent creates another. They soon accumulate and constitute the law. What yesterday was fact, today is doctrine".

II

Your petitioner respectfully urges that a rehearing be granted, for beyond any reason of a doubt, the majority opinion gives the greatest inroad, of any opinion handed down by the Supreme Court of the United States, to an invasion of the protective features of the Fourth Amendment. The majority opinion is correct if they were simply passing upon a question of fact if Harris were guilty of possessing some blank draft cards, regardless if he pos-

sessed them with intent to unlawfully use the same. But we must consider the means of attaining that conclusion. They are too serious to the future of all citizens. The lower courts might be considered, "Blind guides, which strain at a gnat, and swallow a camel".

In the case of *Byars v. United States*, 273 U. S. 28, 33, this Court stated:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

Wherefore, and for the above reasons, and further reasons to be argued orally, your petitioner respectfully urges that a rehearing may be granted, and that this Court allow a reargument, and that the judgment of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

Roy St. Lewis,
Herbert K. Hyde,
Counsel for Petitioner.

I, Roy St. Lewis, an attorney regularly admitted to practice in the Supreme Court of the United States, do certify that in my opinion the foregoing petition for rehearing in the case of *Harris v. United States*, No. 34, is well founded and is not presented for the purpose of creating a delay.

Roy St. Lewis.

May 23, 1947.

IN THE

Supreme Court of the United States

October Term 1946

No. 931

GEORGE HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

MOTION AND BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S APPLICATION FOR A REHEARING

American Civil Liberties Union,
Amicus Curiae.

[illegible]
of the New York Bar,

[illegible]
of the District of Columbia Bar,

On Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 34

GEORGE HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Now comes, The American Civil Liberties Union, by its attorneys, and respectfully moves for leave to file the attached brief, as *Amicus Curiae*, in the above entitled cause. As grounds for said motion movant shows:

1. The American Civil Liberties Union is a non-profit corporation, dedicated to the maintenance and protection of the civil liberties, guaranteed by the Bill of Rights. As such it has an interest in the subject matter of this case.

2. The Petitioner, George Harris, has filed herein a petition for rehearing and the movant desires to support that petition.

3. The Solicitor General has consented to the filing of this brief. Counsel for Petitioner has indicated that he has no objection to the granting of this motion.

Respectfully submitted,

James Lawrence Fly,
Charles A. Horsky,
Counsel for
American Civil Liberties Union.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 34

GEORGE HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S APPLICATION FOR A REHEARING

The American Civil Liberties Union is an organization dedicated to the maintenance and protection of the civil liberties guaranteed by the Constitution—the necessary elements of the freedom and order basic to the functioning of our democracy. In its behalf, with the consent of counsel for the parties, we offer this brief in support of petitioner's petition for a rehearing because we believe the decision of the Court in this case undermines one of the most vital of these liberties—the guarantee of the Fourth Amendment that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant cases and legal distinctions have been presented in the briefs already submitted to this Court. The American Civil Liberties Union here is concerned not only with the result upon the accused but also with the far reaching consequence of the decision.

We believe that the underlying issue here is whether the right of the individual to the privacy of his home is to depend in the future upon the discretion of arresting officers rather than upon the judgment of a magistrate.

We respectfully submit that this Court erred in determining the constitutional reasonableness of the search and the seizure in the instant case for these reasons:

1. The decision sanctions a further encroachment on the safeguards of the Fourth Amendment without giving due weight to the practical effects of that encroachment on the day-to-day lives of private citizens.

2. In any event, the measures employed by the arresting officers in this particular case went beyond those reasonably necessary to effective law enforcement.

The Fourth Amendment protects "the sanctity of a man's home and the privacies of life" and guards against "the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense." *Boyd v. United States*, 116 U. S. 616, 630. Being the pillar of a basic civil liberty, it "should receive a liberal construction." *Gouled v. United States*, 255 U. S. 298, 304; *Go-Bart Co. v. United States*, 282

U. S. 344, 357; *United States* v. *Lefkowitz*, 285 U. S. 452, 464. Any doubts should be resolved in its favor. Exceptions should be carefully limited and not expanded. A man's home is to be his castle to the greatest extent consistent with the public order and the common good. *Ibid.*

While "there is no formula for the determination of reasonableness," and "each case is to be decided on its own facts and circumstances," *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357, it is submitted that the Amendment, as its terms clearly imply, intends, with only minor exceptions, noted below, to restrict searches to those *reasonable* in nature and executed pursuant to search warrants, issued in accordance with the constitutional safeguards. *Agnello* v. *United States*, 269 U. S. 20, 33; *United States* v. *Lefkowitz*, 285 U. S. 452, 463-464. The exceptions involve (a) a search reasonably incident to a lawful arrest, e.g., *Agnello* v. *United States*, 269 U. S. 20; *Marron* v. *United States*, 275 U. S. 192; see also *Davis* v. *United States*, 328 U. S. 582; *United States* v. *Kirschenblatt*, 16 F. (2d) 202; and (b) situations where it is not practicable to secure a search warrant, see *Carroll* v. *United States*, 267 U. S. 132; *United States* v. *Lee*, 274 U. S. 559.

I

The first problem here is the scope to be permitted to the exceptional search and the seizure incident to a lawful arrest. It is well settled that this exception is to be narrowly and carefully limited so as not to render the constitutional requirements for a search warrant practically nugatory.

> The authority of officers to search one's house or place of business contemporaneously with his lawful

> arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States v. Lefkowitz*, 285 U. S. 452, 464.

In other words, to permit searches incident to an arrest to have a greater scope than searches pursuant to the safeguards set forth in the words of the Constitution broadly and dangerously subverts the Amendment. It is unreasonable to allow a man's home to be invaded and his privacy and security disturbed to a greater extent by search incident to arrest than by search pursuant to a search warrant circumscribed by the constitutional limitations. *Gouled v. United States*, 255 U. S. 298, 308-309. See also *Marron v. United States*, 275 U. S. 192, 196; *Go-Bart Co. v. United States*, 282 U. S. 344, 357. For these constitutional requirements, unambiguously set forth in the Amendment, emphasize, "the purpose to protect against all general searches." They prevent "the issue of warrants on loose, vague or doubtful bases of fact." *Ibid.* Yet, to give searches incident to arrests the scope accorded them by the instant decision is to permit just the sort of "general searches" sought to be prevented by the Amendment. To expand the exception, the search and

seizure permissible in the case of an arrest, to the extent approved here, "reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.

The Court's decision shifts the control over searches and seizures from the magistrates, where it is placed by the Constitution, to the police officers who will henceforth execute arrests. Arresting officers, in making their searches, need only act in a manner "consistent" with their looking for objects which could be described as "means" or "fruits" or "instrumentalities" of the crime for which the arrest was made. So long as this requirement is observed, a warrant of arrest affords greater scope for search and seizure than a search warrant itself and avoids the necessity for observing the constitutional safeguards hedging search warrants. Whatever is left of those safeguards as the result of this decision, in the case of arrests, will, in practice, undoubtedly be entirely eliminated. By careful learning and observance of the approved formula, police now, in making arrests, face no limitation to search and seizure that is not self-imposed. With the tremendous spread of police agencies in a modern complex society, this prospect is not inviting.

The argument that search in case of arrest is necessarily limited to a particular time, a particular place, and particular objects (the fruits or instrumentalities of the crime for which the accused is arrested) and that probable cause must first have been established as grounds for the arrest does seem to embrace some "limitations" on the right to search. But these apparent "limitations" evaporate when reduced from words to facts. Almost any crime for which an arrest is made will have, either as "fruit" or as "instrumentality," something which might have been secreted somewhere upon the premises where the

arrest is made—assuming, of course, the arrest is made in a place where the arrested person is not without roots of one sort or another. And what is the significance of the fact that, in the nature of things, a man can be arrested only at a particular time and in a particular place? This "particularity" is wholly within the discretion of those carrying the warrant of arrest. The warrant of arrest itself does not prescribe the time and place; by its very nature, it cannot do so. In terms of actual practice and effect, the right, incident to valid arrest, to make an unlimited search of the entire premises where an arrest takes place empowers one with a warrant of arrest to make a general and exploratory search of any place which the person to be arrested occupies and where he may be found. Cf. *Go-Bart Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452. Little ingenuity need be credited to those who execute arrests to make sound the prediction that arrest warrants will in large measure supplant search warrants and that the safeguards against invasion of privacy will rest in the individual officer's discretion rather than in the procedures and magistrates contemplated by the Constitution.

Marron v. *United States*, 275 U. S. 192, illustrates how easy it would be, as a practical matter, for searchers, searching incidentally to an arrest, to contend they were looking for the "fruits" or "instrumentalities" of the crime and not engaging in general, exploratory searches. The Court there held that "a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business" (275 U. S. at 194) was "a part of the outfit or equipment actually used to commit the offense" (275 U. S. at 199) of violating the prohibition laws and was not merely evidentiary. The decision makes obvious that resort to a

rule regulating searches incident to arrests which makes necessary a case-by-case differentiation between items that are merely "evidentiary," and items which are "fruits" or "instrumentalities," would be no practical deterrent to general, exploratory searches. For in a practical sense, anything linking the arrested to some crime will be both "evidentiary" and a "fruit" or "instrumentality." And the Court, at any rate, has not specified any criteria which will inform police officers how the line of demarcation is to be determined.

The Court's holding that the search for the means employed by petitioner in committing the crime for which he was arrested was reasonable, even if conceded, cannot serve to make lawful the seizure of the irrelevant registration certificates and the classification cards. The search could be considered reasonable only as an incident of that particular arrest, and its scope should be restricted to the means or fruits of the crime for which the arrest was made. If the search incident to an arrest is not so limited, its permissible sweep is greater than that of a search pursuant to a search warrant but is wholly lacking in the constitutional safeguards of the latter. *Marron v. United States*, 275 U. S. 192, 196.

II

Even if this Court were willing to sacrifice constitutional safeguards to the necessities of law enforcement, the necessity is not established here. As a practical matter, observance of the established safeguards against unreasonable searches and seizures need not unduly impede the work of the police. It would not have done so in this case.

The facts here demonstrate that the work of the investigators would not have been made ineffective had they

been required to procure a search warrant for the objects for which they were allegedly looking. Shortly after the arrest of petitioner and the commencement of the search of petitioner's apartment, one of the investigators felt it not unreasonable to leave the apartment to secure a warrant to search petitioner's automobile and his office (R. 19, 70, 72, referred to in Brief for the United States, p. 8), which was secured and pursuant to which a search of the automobile and office was made (R. 20-21, 68, 73, referred to in Brief for the United States, p. 8). So far as appears, it would have been an expeditious, timely procedure to get a search warrant to search for the checks at the same time. Then, when the classification cards and registration certificates were discovered, a search warrant could have been obtained for them. 40 Stat. 217, 228, 18 U. S. C. §612. While authority to search or seize was being duly obtained, the premises could have been watched. The inconvenience to the police resulting from this procedure would be clearly outweighed by the protection afforded to the right against unreasonable search and seizure. Cf. *Taylor* v. *United States*, 286 U. S. 1, 6.

CONCLUSION

***Amicus*, therefore, respectfully submits that petitioner's application for a rehearing should be granted.**

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,

JAMES LAWRENCE FLY,
Of the New York Bar,

CHARLES A. HORSKY,
Of the District of Columbia Bar,

Of Counsel.

May, 1947.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Before me the undersigned authority for said County in said State personally appeared Charlotta Gallap who, being by me first duly sworn stated on oath that on this 29th day of May, 1947, she deposited in the United States mail copies of the foregoing Motion and Brief correctly addressed to Roy St. Lewis, National Press Building, Washington, D. C., Counsel for the Petitioner, and to Honorable George T. Washington, Acting Solicitor General, Department of Justice, Washington, D. C.

CHARLOTTA GALLAP.

Sworn to and subscribed before me
this 29th day of May, 1947.

.....
Notary Public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 34

GEORGE HARRIS,
Petitioner,
v.
THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM AND AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS

In Support of Petition for Rehearing

LEE PRESSMAN,
General Counsel
EUGENE COTTON,
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Congress of Industrial Organizations and
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John J. Abt, Special Counsel
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Glickstein, Anderson, Resner & Sawyer,
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International Longshoremen's & Warehousemen's Union

Boudin, Cohn & Glickstein,
General Counsel
United Office & Professional Workers of America

Victor Rabinowitz, General Counsel
American Communications Association

Ben Meyers, General Counsel
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William Standard, General Counsel
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United Electrical, Radio & Machine Workers of America

Maurice Sugar, General Counsel
United Automobile, Aircraft, Agricultural Implement Workers of America

Harry Sacher, General Counsel
Transport Workers Union of America

Leon M. Despres, General Counsel
United Transport Service Employees of America

Benjamin C. Sigal, General Counsel
United Shoeworkers of America

Harry Weinstock, General Counsel
United Furniture Workers of America

Witt & Cammer, General Counsel
International Fur & Leather Workers Union
International Union of Mine, Mill & Smelter Workers of America

Lindsay P. Walden, General Counsel
Oil Workers International Union

Herman E. Cooper, General Counsel
Utility Workers Union of America

IN THE

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No. 34

GEORGE HARRIS,
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MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM AND AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS

In Support of Petition for Rehearing

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to the provisions of Rule 27(9) of this Court, the Congress of Industrial Organizations and certain of its affiliated organizations made application to all of the parties to the instant case for written consent to the filing of a memorandum amicus curiae. Counsel for petitioner in response to the request replied that he would neither oppose nor consent. The acting solicitor general on behalf of the United States gave his consent. Special reasons for the granting of this motion are contained in the accompanying memorandum.

INTEREST OF PARTIES FILING THIS MEMORANDUM

The Congress of Industrial Organizations and its affiliated organizations seek leave of the Court to file the within memorandum. The construction which the majority of the Court has placed upon the Fourth Amendment to the Constitution of the United States is of great concern to all members of the

Congress of Industrial Organizations and its affiliated organizations. Under this new construction police officers are afforded an almost unlimited means of search and seizure unhampered by the cherished safeguards of the Fourth Amendment. Aware that the destruction of any of the guarantees of the Bill of Rights constitutes a threat to the existence of that climate of democratic liberty which is essential to the functioning of free trade unions, the Congress of Industrial Organizations believes that the decision in this case is of vital importance to it.

ARGUMENT

The effects of the decision are far-reaching:

1. It authorizes a search of a home without a search warrant, a thing never before sanctioned by our courts and which the Fourth Amendment expressly prohibits.

2. It authorizes a seizure of unlimited types of property without a search warrant, whereas previously only the most limited right to seize without a search warrant was recognized —a right to seize only contraband goods or tools of crime and then only when they happened to come under the eyes of police officers without a search.

3. It authorizes a search of the kind never before permissible under any circumstances—the general exploratory search, for which not even a warrant can issue since the Fourth Amendment explicitly restricts the search warrant to things "particularly" described.

4. It authorizes a seizure of the kind never before permissible under any circumstances—whereas a seizure under a warrant is always limited to goods particularly described in the warrant the seizure here may be of goods no one ever suspected even existed.

Thus the effect of the decision is not merely to legalize conduct of police officers where they lacked a warrant but to legalize conduct never permissible under a warrant. The decision therefore not merely allows police to omit to secure a warrant but puts a premium on their use of this new method of search since it affords them privileges no warrant could confer.

The decision greatly reduces the security and privacy which

the American citizen believed the Constitution guaranteed. The Court assumes that its decision follows a line of precedents. On each point it purports to rely on authorities. If gradually over the years the rights protected by the Fourth Amendment had been so whittled away that precedents add up to the present great loss, there would be real cause to begin a reconsideration of where the cases had step by step led the courts. But an examination of the precedents cited shows that the Court has taken language out of context and without regard to its reasoning as the basis for reaching the present astounding decision.

1. The Court states that the right to search at the time of a lawful arrest has always been recognized (Slipsheet, p. 5). It points to language in opinions which state that the right to search a prisoner extends to things in his possession as well as on his person. It therefore assumes that because his home or office is in his possession it may be searched as an incident to the arrest. But the one exception to the right to search without a warrant when making a lawful arrest has always been narrowly limited by the reasons for this exception. Courts have pointed out that the right to search a prisoner upon lawful arrest is necessary to deprive the prisoner of potential means of escape, *Closson* v. *Morrison*, 47 N. H. 482, or to prevent the prisoner from destroying evidence otherwise properly subject to seizure, *Reifsnyder* v. *Lee*, 44 Iowa 101, 103; *Holker* v. *Hennessey*, 141 Mo. 527, 42 S. W. 1040.

The application of the requirements of the Fourth Amendment to the search of a prisoner would have made a farce of the right to arrest. If an officer had to await the judicial steps incident to the issuance of a warrant before he could search a prisoner for a weapon or take it away from him, the officer might first lose his prisoner. This exception included only the right to search a prisoner and to seize objects on him or within his reach. When the courts used the word "possession" here they had reference to immediate physical possession of weapons or property which made actual use or disposition of the property before a warrant could be had such a risk that foregoing of a warrant was essential. Hence such a search and seizure has not been deemed to be "unreasonable" within the meaning of the Fourth Amendment.

But these cases have never suggested that the search of rooms or buildings which can easily be maintained in status quo until a warrant has issued would ever be justified. To search or seize in any circumstance where a warrant could be obtained without real risk of losing the prisoner or goods is always "unreasonable" under the Fourth Amendment. This Court by ignoring the reasons for this narrow exception and by enlarging the exception to include a vast area where the reasons for the exception have no possible application, has virtually wiped out the Fourth Amendment.

2. This Court has repeatedly held that "an arrest may not be used as a pretext to search", *United States* v. *Lefkowitz*, 285 U. S. 452, 466, and cases there collected. It is clear that these holdings had reference to a lawful arrest and recognized the very narrow limits upon the searches and seizures which could properly accompany an arrest. This Court, however, assumed in the instant case that a lawful arrest could take the place of a search warrant as the basis of a broad search and seizure. It distinguished the *Lefkowitz* and other cases by asserting, "Nor is this a case in which law enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search" (Slipsheet, p. 7).

But under the decisions it is clear that even a *bona fide* arrest cannot afford the basis for a search and seizure without a proper warrant. The Fourth Amendment makes explicit the requirement that the warrant describe "the place to be searched, and the persons or things to be seized." It leaves no room for assuming that a warrant for the seizure of a person obviates the necessity for a warrant describing the place to be searched and the things to be seized. This Court has repeatedly stated the high public policy which motivated and justified the requirement that searches and seizures be limited to such places and things as have been authorized in a warrant issued "upon probable cause, supported by oath or affirmation." In the *Lefkowitz* case this Court pointed out that "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers and others who may hap-

pen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime" (285 U. S. at 464).

It is submitted that the *bona fides* of the arrest cannot afford a proper substitute for a warrant issued by judicial authority. Down through the years both American and English courts have deemed the securing of a warrant particularly describing the place to be searched and the thing to be seized as but a minor inconvenience to police officers—a mere trifle in delay and trouble—when compared with the great good resulting from the secure knowledge of all citizens that their homes could not be searched nor their possessions seized until a magistrate had received an oath or an affirmation that there was probable basis to search in a given place for given goods and had issued a warrant limited to the place and things described. If the decision of this Court is left in effect that security is wiped out. Police officers are by fiat of this Court authorized to make an unlimited search or seizure whenever they are able to effectuate an arrest at the place they desire to ransack. Even though no person has ever sworn or affirmed that any illegal goods were possessed, police officers may conduct a search without prior limitation as to scope. Nor will police officers be limited to the seizure of illegal goods which the oath or affirmation afforded basis for believing were at a given place; since there will be no search warrant particularly describing the goods to be seized, any goods may be seized.

3. The Court attempts to justify the seizure in this case on the ground that "In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search." (Slipsheet, p. 9.) Such a doctrine would give police officers the incentive to make unlawful searches by assuring them that the success of the search will retroactively legalize it. This Court has steadfastly held that "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional

system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. *Weeks v. United States*, 232 U. S. 383, 393; *Gauled* v. *United States*, 255 U. S. 298, 306; *Amos* v. *United States*, 255 U. S. 313; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391; *Agnello* v. *United States*, 269 U. S. 20, 22." *Byars* v. *United States*, 273 U. S. 28, 29. In the *Byars* case the goods which this Court held were improperly seized were counterfeit federal internal revenue stamps. If the continuing crime of possessing such stamps did not justify their seizure in the *Byars* case it is hard to see how the nature of the draft registration cards in the instant case should call for a different result.

The words of this Court in the *Lefkowitz* case (285 U. S. 452, 462) are here applicable

> "There is nothing in the record to support the claim that, at the time of the arrest, the offense for which the warrant issued or any other crime was being committed in the presence of the officers."

Certainly the officers were unaware that any violation of the Selective Service Act was in progress when they undertook the search. Cf. *Go-Bart* v. *United States*, 282 U. S. 344, 357. If what transpired here may be said to justify a seizure without warrant because of a crime committed in the presence of officers, virtually all seizures without warrant will be legalized. All stolen goods, contraband goods, forged goods, give rise to the same legal theory of constructively continuing offenses. Never before had it been assumed that the protection of the Fourth Amendment was inapplicable because of an offense constructively committed in the presence of the officer.

4. The Court by sanctioning the seizure of the draft registration cards under the circumstances of the instant case gives approval to the general exploratory search. No contention has ever been made that the officers who searched the petitioner's apartment were looking for draft registration cards or any other articles pertaining to violation of the Selective Service Act. The Fourth Amendment prohibits the issuance of warrants for a general exploratory search for it requires that the goods to be seized be particularly described.

This Court has uniformly condemned general exploratory searches. *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *Gauled* v. *United States*, 255 U. S. 298, 306, 310; *Amos* v. *United States*, 255 U. S. 313; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391.

The American people are profoundly shocked by the decision. An unprecedented number of articles, editorials, cartoons, letters to the press have appeared in the daily and weekly press continuously since the opinion was announced. Many of the articles and letters have been written by distinguished members of the bar. The great weight of opinion is that the decision virtually repeals the Fourth Amendment. See Twohey, *Analysis of Newspaper Opinion*, week ending May 10, 1947, p. 4.

For the foregoing reasons it is respectfully urged that this Court grant the petition for rehearing and reverse the judgment of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 34.

GEORGE HARRIS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

APPLICATION OF BROTHERHOOD OF RAILROAD TRAINMEN FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

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APPLICATION FOR LEAVE TO FILE BRIEF.

The applicant, the Brotherhood of Railroad Trainmen, is a labor union, the nature of whose membership is indicated by its name. It feels that labor organizations have a particularly vital stake in the Constitutional protection against unreasonable searches and seizures. A rule of law developed today in a case involving a petty criminal may

tomorrow rationalize an oppression of economic dissidence. Police infringements of civil liberties frequently have an economic or political inspiration, as contrasted with a simple zeal to apprehend and convict criminals. Labor leaders and organizers have traditionally been among the principal victims of such abuses.

For these reasons, the Brotherhood of Railroad Trainmen asks leave to file a brief as amicus curiae in support of the application for rehearing in the above-entitled case.

ARGUMENT.

Few provisions of the Constitution have a clearer and simpler motivation than the Fourth Amendment's prohibition of unreasonable search or seizures. The odium which attached to the writ of assistance inspired the provision, and it is in this tradition and with this background that the Amendment must be applied. See Chafee, *Freedom of Speech* (1930) 279; Fraenkel, *Concerning Searches and Seizures* (1921) 34 Harv. L. Rev. 361, 362-5.

The vice of the writ of assistance was its generality, as indicated by its alternative name, the "general warrant." True it was also issued without an adequate showing of cause for search, but this too derived from its generality. For what prior adequate showing can be made to justify a search for objects of any nature and kind whatsoever? A warrant which supports a general search and testimony as to whatever is found is thus a writ of assistance no matter how circumscribed its text.

The offensiveness of the general warrant arose from the indignity of a ransacking search, particularly when conducted in the home, and from the exposure to the eyes of the searchers of personal and private affairs which had nothing to do with any offense against the crown. The founders of the Republic chose to protect the people from this oppression even if at some cost to police efficiency.

In *Marron* v. *United States*, 275 U. S. 192 (1927), this Court refused to permit a search warrant to support a

seizure of objects other than those described therein. If it had held otherwise, the general writ would, for all practical purposes, have been resurrected.

Under the Court's holding in the instant case, however, a lawful arrest, no matter how petty the offense charged, permits a general search. This search, and the evidence derived therefrom, are not limited to objects relevant to the offense for which the arrest was made. The search may be a ransacking of the arrested person's house, including an examination of his concealed private papers. Under the *Marron* case, a warrant of search cannot be used as a writ of assistance; but under the present holding, a warrant of arrest or a lawful arrest without warrant can be used to fulfill the functions of the general writ, as already described.

It is true that the arrest must be supported by a showing of probable cause for arrest. This is a minor handicap for any alert police official in view of the multitude of petty offenses which even the most exemplary citizen may commit. The Constitution, moreover, requires not merely cause for arrest, but cause for the search. The arrest itself is a sufficient cause to support a search of the person arrested and objects within his physical reach, in order to deprive him of instruments of escape or harm to the arresting officials, or of fruits of crime which he might destroy. No such justification arises, however, to support a five-hour search of a home from top to bottom, including an examination of papers deposited in desks or bureau drawers.

The handicap of showing cause for an arrest is more than compensated for, moreover, by the discretion assigned to the police official, rather than the magistrate, to determine the premises of the arrest, and hence of the search.

The Fourth Amendment requires that searches be made only upon probable cause shown to a magistrate. It is a frustration of the Amendment's intent to permit a showing of cause for an arrest to dispense with any showing for a search. No cause can, moreover, constitutionally be shown for a search for unspecified articles.

The Court's opinion supports its holding as an application of the familiar doctrine of incidental search accompanying a lawful arrest. But the Constitutional guaranty should not be vitiated by an extension of decisional law. The scope of an "incidental search" must be severely limited if the Fourth Amendment is to be more than a platitude. This case carries the incidental search doctrine to an unheard of extreme, in flat contradiction to *Go-Bart Co.* v. *United States*, 282 U. S. 344 (1941) and *United States* v. *Lefkowitz*, 285 U. S. 452 (1932). The majority considers the search to have been incidental to the arrest because the offense charged in the warrant involved small pieces of paper. But this conception of what is "incidental" is an innovation. The search that may accompany an arrest is an incident of the arrest only in the sense that it is justified by the arrest itself rather than by an independent warrant. The fact of its incidental nature does not mean that its scope is defined by the offense for which the arrest is made, for in that case the warrant of arrest clearly becomes a warrant of search. Instead, the scope of the search is defined by the circumstances and locus of the arrest (not by the nature of the charge), and is confined by the Fourth Amendment. Under this test, a five-man, five-hour search of a small apartment is certainly not "incidental" to an arrest which presumably was made by one man in a matter of seconds.

In the *Go-Bart* and *Lefkowitz* cases, the doctrine of incidental search yielded to the Constitutional purposes, even where the objects found were relevant to the crime for which the arrest was made. In this case, the Constitutional purposes have been made to yield, even though the discovered objects had no such relevancy. The Court's opinion distinguishes the *Go-Bart* and *Lefkowitz* decisions on the grounds that in those cases the officers had entered the premises "ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending

to connect the accused with some crime." Such a distinction, however, limits the Amendment to the impossible confines of proof of the subjective intent of the enforcement officials. And that the objects discovered in this case were properly subject to seizure can by no means justify the making of the search. The offensive features of a general search which we earlier pointed out—indignity and the exposure of private affairs—exist even though objects found may be properly seized.

It is in the post-war turmoil that the liberties guaranteed by the bill of rights are at once most likely to suffer and most essential to our democratic processes. We submit that the Court's decision jeopardizes the Fourth Amendment and that a rehearing should be granted.

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IN THE

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v.

THE UNITED STATES OF AMERICA.

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

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IN THE

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OCTOBER TERM, 1946.

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THE UNITED STATES OF AMERICA.

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APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

APPLICATION FOR LEAVE TO FILE BRIEF.

The National Lawyers Guild prays for leave to file a brief as amicus curiae in the above entitled case. The National Lawyers Guild is an organization of members of the American Bar devoted, among other things, to the protection of our democratic institutions and the civil rights and liberties of all the people. Because it believes that the decision of the Court in the instant case strikes a serious

blow at those institutions and rights as they have been recognized until now, it respectfully requests leave to file a brief as amicus curiae in support of petitioner's application for a rehearing. It is respectfully submitted that final determination of an issue of such grave consequence to the American people should not be made without affording to public organizations interested in civil rights, the fullest opportunity to be heard.

BRIEF FOR AMICUS CURIAE.

ARGUMENT.

The majority of the Court, for the first time in its history, has approved the seizure of materials taken after an extended roving search of a small apartment. Never before has the doctrine that a search is reasonable if accompanying a valid arrest been carried to such lengths. Indeed, at least twice, this Court has unanimously ruled otherwise (*Go-Bart Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452).

The instant case is all the more disturbing in its implications because the arresting officers could easily have obtained a search warrant for the material which they claimed to be looking for, and the search for which formed the only justification for what actually took place.

Unless this decision is repudiated by the Court, police officers and other investigating agents will be encouraged to make roving searches without warrants instead of getting search warrants, and to make the widest possible kind of search of a man's home every time they make an arrest for any offense whatever. Then, even if the arresting officer finds nothing which might assist in the prosecution of the charge for which the arrest was made, he may find something to justify an entirely different prosecution. Such practices by the police leave little to the sanctity of the home or the privacy of papers which the Fourth Amendment was intended to safeguard. By what conceivable standards can searches such as these be declared reasonable?

We respectfully submit that the opinion of the majority indicates no standards. It rests solely on the fact that there was a lawful arrest and that the seized papers were in the home of the person arrested. For the argument made by the majority that the papers taken were properly subject to seizure begs the question actually presented for consideration. It is clear from repeated decisions of this Court that search and seizure of evidential material is improper (*Boyd* v. *United States*, 116 U. S. 616; *Gouled* v. *United States*, 255 U. S. 298; *United States* v. *Lefkowitz*, supra). Therefore, unless the papers fell into the category of contraband or instrumentalities of crime, they could not have been seized at all, even under a valid search warrant. The further comment by the majority that the things seized were property "of which the Government was entitled to possession" merely indicates that under other circumstances, the papers might have been properly seized, as for instance if they had been found on the person of the accused at the time of his arrest. But the character of the property seized cannot validate a search otherwise unlawful (*Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20).

Nor can the search be justified by the contention that it was a crime for petitioner to keep the papers and that that crime was "being committed in the very presence of the agents." If the implication is that petitioner could properly have been arrested for that crime so that the instrumentalities of it could lawfully have been seized, then it must be pointed out that the agents were ignorant of the commission of this crime until they found these very papers. They therefore could not lawfully have arrested petitioner on that charge. This Court has clearly ruled that a search otherwise bad cannot be made good by an arrest based on what was found at the time of the search (*Rabinowitz* v. *United States*, 273 U. S. 28; *Taylor* v. *United States*, 286 U. S. 1).

In attempting to distinguish the *Go-Bart* and *Lefkowitz* decisions, the majority has laid down what we respectfully suggest is a wholly unrealistic criterion, one, moreover, not borne out by an analysis of those two cases. It is said that the searches in those cases were condemned because the premises there had been entered only "ostensibly" for the purpose of making an arrest and that the real purpose had been to make exploratory searches, whereas here the agents had reasonable cause to believe that petitioner was guilty. But are not those considerations which affect the validity of an arrest, not the validity of a search?

It is suggested also that the search in the case at bar was directed to the means by which the charged crimes had been committed. Surely that argument defeats itself. If the officers had such precise knowledge of what they were looking for, they could have obtained a search warrant for those articles and it was their duty to have done so. Had they obtained such a warrant their search would have been limited to the articles described in the warrant (see *Marron* v. *United States*, 275 U. S. 192, 196). If the officers had no such knowledge, they could have obtained no warrant.* In such case, their search would have been exploratory only and they should not be allowed to make use of what they found after a five-hour search in a small apartment.

We respectfully suggest, moreover, that this Court did not rest its unanimous decisions in the *Go-Bart* and *Lefkowitz* cases on the doctrine now ascribed to it by the majority opinion, namely, that the arrests there were "ostensible" only. In the *Go-Bart* case petitioner claimed that the arrest was illegal because there were no reasonable grounds for believing that a felony had been committed. The Government conceded that the warrant under which the arrest was made was void because based on insufficient papers, but contended that the arresting officers had knowledge of facts

* For a warrant to search a dwelling is void unless based on proper allegations of fact (*Grau* v. *United States*, 287 U. S. 124; *Nathanson* v. *United States*, 290 U. S. 41).

sufficient to justify the arrest without a warrant. This Court agreed, assuming, as the lower Courts had found, that the arrest was lawful because of this knowledge. Nevertheless, the search was held bad. The Court reached this conclusion for reasons equally operative in the case at bar, that the searches were unlimited and ransacking and that the arresting officers had ample opportunity to swear out a valid search warrant. If that be the rule when, as there, the papers seized related to the very crime for which the arrest was made, it should certainly be the rule here, when the papers seized had no relation to that crime.

The *Lefkowitz* case reaffirms the earlier one. There the legality of the arrest was not challenged. As in the *Go-Bart* case, the material taken had relation to the crime for which the accused was arrested. Mr. Justice Butler for the unanimous Court made a careful statement of the limitation imposed on officers making arrests.

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." (p. 464).

Everything there said is clearly applicable to the case at bar.

It is respectfully submitted, therefore, that this Court should grant a rehearing so as to preserve rights which the Fourth Amendment intended to guarantee to the people.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 34.—October Term, 1946.

George Harris, Petitioner,
v.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 5, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

Petitioner was convicted on sixteen counts of an indictment [1] charging the unlawful possession, concealment and alteration of certain Notice of Classification Cards and Registration Certificates in violation of § 11 of the Selective Training and Service Act of 1940,[2] and of § 48 of the

[1] The indictment contained nineteen counts. Petitioner was convicted on the second which charged the fraudulent concealment of 8 Notice of Classification Cards, DSS Form 57, and 11 Registration Certificates, DSS Form 2; the third which charged fraudulent possession with intent to convert to his own use the above-mentioned property; the fourth through tenth charging the unlawful alteration of a Notice of Classification card; the twelfth and fourteenth through nineteenth charging the unlawful possession of an altered Notice of Classification Card. Petitioner was acquitted on the first count which charged theft of government property. Count 11, which charged alteration of a Notice of Classification card, and count 13, which charged possession of an altered card, were dismissed. Petitioner was sentenced to imprisonment for a term of five years on each of the sixteen counts indicated, the sentences to run concurrently.

[2] 54 Stat. 885, 894–895, 50 U. S. C. App. § 311. Section 623.61–2 of the Selective Service Regulations states that "It shall be a violation of these regulations for any person to have in his possession" a Notice of Classification not regularly issued to him or to alter or forge any Notice of Classification. Section 11 of the Act makes criminal the failure to perform any duty required by the Regulations punishable by imprisonment for not more than five years or a fine of not more than $10,000.00 or both.

Criminal Code.[3] Prior to the trial, petitioner moved to suppress the evidence, which served as the basis for the conviction, on the grounds that it had been obtained by means of an unreasonable search and seizure contrary to the provisions of the Fourth Amendment[4] and that to permit the introduction of that evidence would be to violate the self-incrimination clause of the Fifth Amendment.[5] The motion to suppress was denied, and petitioner's numerous objections to the evidence at the trial were overruled. The Circuit Court of Appeals affirmed the conviction. Certiorari was granted because of the importance of the questions presented.

Two valid warrants of arrest were issued. One charged that petitioner and one Moffett had violated the Mail Fraud Statute[6] by causing a letter addressed to the Guaranty Trust Company of New York to be placed in the mails for the purpose of cashing a forged check for $25,000.00 drawn on the Mudge Oil Company in pursuance of a scheme to defraud. The second warrant charged that petitioner and Moffett, with intent to defraud certain

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[3] 35 Stat. 1098, 18 U. S. C. § 101. Insofar as pertinent, the section provides: "Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain any . . . property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; . . ."

[4] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[5] Insofar as pertinent, the Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

[6] 35 Stat. 1130–1131, 18 U. S. C. § 338.

banks and the Mudge Oil Company, had caused a $25,000.00 forged check to be transported in interstate commerce, in violation of § 3 of the National Stolen Property Act.[2]

Five agents of the Federal Bureau of Investigation, acting under the authority of the two warrants, went to the apartment of petitioner in Oklahoma City and there arrested him. The apartment consisted of a living room, bedroom, bathroom and kitchen. Following the arrest, which took place in the living room, petitioner was handcuffed and a search of the entire apartment was undertaken. The agents stated that the object of the search was to find two $10,000.00 canceled checks of the Mudge Oil Company which had been stolen from that company's office and which were thought to have been used in effecting the forgery. There was evidence connecting petitioner with that theft. In addition, the search was said to be for the purpose of locating "any means that might be used to commit these two crimes, such as burglary tools, pens, or anything that could be used in a confidence game of this type."[3]

One agent was assigned to each room of the apartment and, over petitioner's protest, a careful and thorough search proceeded for approximately five hours. As the search neared its end, one of the agents discovered in a bedroom bureau drawer a sealed envelope marked "George Harris, personal papers." The envelope was torn open and on the inside a smaller envelope was found containing eight Notice of Classification cards and eleven Registration Certificates bearing the stamp of Local Board No. 7 of

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[2] 53 Stat. 1178–1179, 18 U. S. C. § 413 *et seq.*

[3] The agents who testified in the proceedings in the trial court clearly stated that the object of the search was the means employed in committing the crimes charged in the warrants of arrest. None of the subsequent statements of the agents, if read in their context, are in conflict with that assertion.

Oklahoma County. It was this evidence upon which the conviction in the District Court was based and against which the motion to suppress was directed. It is conceded that the evidence is in no way related to the crimes for which petitioner was initially arrested and that the search which led to its discovery was not conducted under the authority of a search warrant.[9]

In denying the motion to suppess the District Court wrote no opinion. The Circuit Court of Appeals affirmed the conviction, finding that the search was carried on in good faith by the federal agents for the purposes expressed, that it was not a general exploratory search for merely evidentiary materials, and that the search and seizure were a reasonable incident to petitioner's arrest.[10]

If it is true, as petitioner contends, that the draft cards were seized in violation of petitioner's rights under the Fourth Amendment, the conviction based upon evidence so obtained cannot be sustained. *Boyd* v. *United States*, 116 U. S. 616 (1886); *Weeks* v. *United States*, 232 U. S. 383 (1914); *Agnello* v. *United States*, 269 U. S. 20 (1925); *Segurola* v. *United States*, 275 U. S. 106 (1927). This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment ". . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as

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[9] It appears that the checks were never found. Respondent concedes that in addition to the draft cards, seven pens and a quantity of tissue paper capable of being employed as instruments of forgery were seized. Also taken were twenty-seven pieces of celluloid which at the trial were demonstrated to be useful in picking a lock. It was respondent's theory that petitioner had obtained the canceled checks by theft from the offices of the Mudge Oil Company and that entry into the offices had been achieved in that manner. Petitioner alleged in his motion to suppress that various other items were taken including sheets of blank paper, expense bills and receipts, personal mail letters, etc.

[10] The opinion of the Circuit Court of Appeals is reported at 151 F. 2d 837.

important and as imperative as are the guarantees of the other fundamental rights of the individual citizen . . ." *Gouled* v. *United States*, 255 U. S. 298, 304 (1921).

This Court has also pointed out that it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. "Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Company* v. *United States*, 282 U. S. 344, 357 (1931).

The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin [11] and has long been an integral part of the law-enforcement procedures of the United States [12] and of the individual states.[13]

The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello* v. *United States*, *supra*, at 30, it was said:

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[11] See opinion of Cardozo, J., in *People* v. *Chiagles*, 237 N. Y. 193, 142 N. E. 583 (1923); *Trial of Henry and John Sheares*, 27 How. St. Tr. 255, 321 (1798).

[12] Examples of the practice are to be found in numerous cases in this Court and in the lower federal courts. *Weeks* v. *United States*, *supra*; *Agnello* v. *United States*, *supra*; *Carroll* v. *United States*, 267 U. S. 132 (1925); *United States* v. *Lee*, 274 U. S. 559 (1927); *Marron* v. *United States*, 275 U. S. 192 (1927); *Go-Bart Importing Company* v. *United States*, *supra*; *United States* v. *Lefkowitz*, 285 U. S. 452 (1932); *Parks* v. *United States*, 76 F. 2d 709 (1935); *United States* v. *71 1/4 Ounces Gold*, 94 F. 2d 17 (1938); *Matthews* v. *Correa*, 135 F. 2d 534 (1943).

[13] *Argetakis* v. *State*, 24 Ariz. 599, 212 Pac. 372 (1923); *Commonwealth* v. *Phillips*, 224 Ky. 117, 5 S. W. 2d 887 (1928); *Banks* v. *Farwell*, 21 Pick. (Mass.) 156 (1839). And see cases cited in 32 A. L. R. 697; 51 A. L. R. 434.

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted." [14] It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.[15]

Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested.[16] Petitioner was in exclusive possession of a four room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment. Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive. But the area

[14] Similar expressions may be found in the cases cited in notes 12 and 13. There is nothing in the *Go-Bart* and *Lefkowitz* cases, *supra*, which casts doubt on this proposition.

[15] Stricter requirements of reasonableness may apply where a dwelling is being searched. *Davis* v. *United States*, 328 U. S. 582 (1946); *Matthews* v. *Correa*, *supra*, at 537.

[16] Searches going beyond the room of arrest were upheld in the *Agnello* and *Marron* cases, *supra*. The searches found to be invalid in the *Go-Bart* and *Lefkowitz* cases were so held for reasons other than the areas covered by the searches. It has not been the understanding of the lower federal courts that the search in every case must be so confined. See, for example: *United States* v. *Lindenfeld*, 142 F. 2d 829 (1944); *Matthews* v. *Correa*, *supra*; *United States* v. *7141 Ounces Gold*, *supra*.

which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.

Similar considerations are applicable in evaluating petitioner's contention that the search was, in any event, too intensive. Here again we must look to the particular circumstances of the particular case. As was observed by the Circuit Court of Appeals: "It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot. . . ." The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still. We do not believe that the search in this case went beyond that which the situation reasonably demanded.

This is not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime. *Amos* v. *United States*, 255 U. S. 313 (1921); *Byars* v. *United States*, 273 U. S. 28 (1927); *Nueslein* v. *District of Columbia*, 115 F. 2d 690 (1940). Here the agents entered the apartment under the authority of lawful warrants of arrest. Neither was the entry tortious nor was the arrest which followed in any sense illegal.

Nor is this a case in which law enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. *Go-Bart Company* v. *United States, supra; Lefkowitz* v. *United States, supra.* In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which the warrants of arrest were issued. The search was not a general explora-

tion but was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks of the Mudge Oil Company. The Circuit Court of Appeals found and the District Court acted on the assumption that the agents conducted their search in good faith for the purpose of discovering the objects specified. That determination is supported by the record. The two canceled checks were stolen from the offices of the Mudge Oil Company. There was evidence connecting petitioner with that theft. The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose.

Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.[17] Clearly the checks and other means and instrumentalities of the crimes charged in the warrants toward which the search was directed as well as the draft cards which were in fact seized fall within that class

[17] *Boyd* v. *United States*, *supra*, at 623–624; *Weeks* v. *United States*, *supra*, at 392–393; *Gouled* v. *United States*, *supra*, at 309; *Carroll* v. *United States*, *supra*, at 149–150; *Agnello* v. *United States*, *supra*, at 30; *Marron* v. *United States*, *supra*, at 199; *United States* v. *Lefkowitz*, *supra*, at 465–466. The same distinction is drawn in numerous cases in the lower federal courts: *Matthews* v. *Correa*, *supra*, at 537; *United States* v. *Lindenfeld*, *supra*, at 832; *In re Ginsberg*, 147 F. 2d 749, 751 (1945).

of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers.[18]

Nor is it a significant consideration that the draft cards which were seized were not related to the crimes for which petitioner was arrested. Here during the course of a valid search the agents came upon property of the United States in the illegal custody of the petitioner. It was property to which the Government was entitled to possession.[19] In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.[20]

The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory. This Court has always been alert to protect

[18] *Entick* v. *Carrington*, 19 How. St. Tr., 1030, 1073–1074.

[19] *Davis* v. *United States*, *supra* at 590. And see *Boyd* v. *United States*, *supra*, 623–624; *Wilson* v. *United States*, 221 U. S. 361, 380 (1911).

[20] *Adam* v. *United States*, 296 F. 629 (1924); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736 (1926); *United States* v. *Two Soaking Units*, 48 F. 2d 107 (1931); *Paper* v. *United States*, 53 F. 2d 184 (1931); *Benton* v. *United States*, 70 F. 2d 24 (1934); *Matthews* v. *Correa*, *supra*.

against such abuse. But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable. We conclude that in this case the evidence which formed the basis of petitioner's conviction was obtained without violation of petitioner's rights under the Constitution.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 34.—October Term, 1946.

George Harris, Petitioner, v. The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 5, 1947.]

Mr. Justice Jackson, dissenting.

This case calls upon the Court to say whether any right to search a home is conferred on officers by the fact that within that home they arrest one of its inhabitants. The law in this field has not been made too clear by our previous decisions. I do not criticize the officers involved in this case because this Court's decisions afford them no clear guidance.

The Fourth Amendment first declares in bold broad terms: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." Our trouble arises because this sentence leaves debatable what particular searches are unreasonable ones. Those who think it their duty to make searches seldom agree on this point with those who find it in their interest to frustrate searches.

The Amendment, having thus roughly indicated the immunity of the citizen which must not be violated, goes on to recite how officers may be authorized, consistently with the right so declared, to make searches: ". . . and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Here endeth the command of the forefathers, apparently because they believed that by thus controlling search

warrants they had controlled searches. The forefathers, however, were guilty of a serious oversight if they left open another way by which searches legally may be made without a search warrant and with none of the safeguards that would surround the issuance of one.

Of course, a warrant to take a person into custody is authority for taking into custody all that is found upon his person or in his hands. Some opinions have spoken in generalities of this right to search such property incidentally to arrest of the person as including whatever was in the arrested person's "possession."

Repeated efforts have been made to expand this search to include all premises and property in constructive possession by reason of tenancy or ownership. While the language of this Court sometimes has been ambiguous, I do not find that the Court heretofore has sustained this extension of the incidental search. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452. In this respect, it seems to me, the decision of today goes beyond any previous one and throws a home open to search on a warrant that does not in any respect comply with the constitutional requirements of a search warrant and does not even purport to authorize any search of any premises.

The decision certainly will be taken, in practice, as authority for a search of any home, office or other premises, if a warrant can be obtained for the arrest of any occupant and the officer chooses to make the arrest on the premises. It would seem also to permit such search incidentally to an arrest without a warrant if the circumstances make such arrest a lawful one. It would also appear to sanction a search of premises even though the arrest were for the most petty of misdemeanors. It leaves to the arresting officer choice of the premises to be searched insofar as he can select the place among those in which the accused might be found where he will execute the warrant of per-

sonal arrest. Thus, the premises to be searched are determined by an officer rather than by a magistrate, and the search is not confined to places or for things "particularly described" in a warrant but, in practice, will be as extensive as the zeal of the arresting officer in the excitement of the chase suggests. Words of caution will hedge an opinion, but they are not very effective in hedging searches.

The difficulty with this problem for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the CHIEF JUSTICE—and that means to me no limit at all.

I am unable to suggest any test by which an incidental search, if permissible at all, can in police practice be kept within bounds that are reasonable. I hear none. I do not agree with other Justices in dissent that the intensity of this search made it illegal. It is objected that these searchers went through everything in the premises. But is a search valid if superficial and illegal only if it is thorough? It took five hours on the part of several officers. But if it was authorized at all, it can hardly become at some moment illegal because there was so much stuff to examine that it took overtime. It is said this search went beyond what was in "plain sight." It would seem a little capricious to say that a gun on top of a newspaper could be taken but a newspaper on top of a gun insulated it from seizure. If it were wrong to open a sealed envelope in this case, would it have been right if the mucilage failed to stick? The short of the thing is that we cannot say that a search is illegal or legal because of what it ends in. It is legal or illegal because of the conditions in which it starts.

I cannot escape the conclusion that a search, for which we can assign no practicable limits, on premises and, for

things which no one describes in advance, is such a search as the Constitution considered "unreasonable" and intended to prohibit.

In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of individual life. In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment. The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate. If these conditions are necessary limitations on a court's power expressly to authorize a search, it would not seem that they should be entirely dispensed with because a magistrate has issued a warrant which contains no express authorization to search at all.

Of course, this, like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self respect. They may have overvalued privacy, but I am not disposed to set their command at naught.

SUPREME COURT OF THE UNITED STATES

No. 34.—October Term, 1946.

George Harris, Petitioner,
v.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 5, 1947.]

Mr. Justice Murphy, dissenting.

The Court today has resurrected and approved, in effect, the use of the odious general warrant or writ of assistance, presumably outlawed forever from our society by the Fourth Amendment. A warrant of arrest, without more, is now sufficient to justify an unlimited search of a man's home from cellar to garret for evidence of any crime, provided only that he is arrested in his home. Probable cause for the search need not be shown; an oath or affirmation is unnecessary; no description of the place to be searched or the things to be seized need be given; and the magistrate's judgment that these requirements have been satisfied is now dispensed with. In short, all the restrictions put upon the issuance and execution of search warrants by the Fourth Amendment are now dead letters as to those who are arrested in their homes.

That this decision converts a warrant for arrest into a general search warrant lacking all the constitutional safeguards is demonstrated most plainly by the facts. Two valid warrants were issued for the arrest of petitioner and one C. R. Moffett. The first warrant charged them with a violation of the mail fraud statute, § 215 of the Criminal Code; it was alleged that they sent a letter through the mails in connection with the execution of a scheme to defraud by negotiating and cashing a forged check drawn on the Mudge Oil Co. in the sum of $25,000. The second warrant charged that they caused the same check to be transported in interstate commerce in violation of § 3 of the National Stolen Property Act.

Two agents of the Federal Bureau of Investigation went to petitioner's apartment, armed with these warrants for arrest. Petitioner was placed under arrest in the living room of his apartment and was safely handcuffed. The agents, together with three others who had arrived in the meantime, then began a systematic ransacking of the apartment. Operating without the benefit of a search warrant, they made a search which they admitted was "as thorough as we could make it." For five hours they literally tore the place apart from top to bottom, going through all of petitioner's clothes and personal belongings, looking underneath the carpets, turning the bed upside down, searching through all the bed linen, opening all the chest and bureau drawers, and examining all personal papers and effects. Nothing was left untouched or unopened.

The agents testified that they were searching for "two $10,000 canceled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company" and which might have been used in connection with forging the $25,000 check in issue. It was also admitted that they were searching "for any means that might have been used to commit these two crimes [charged in the warrants for arrest], such as burglar tools, pens, or anything that could be used in a confidence game of this type"; "we thought we might find a photostatic copy [of the $25,000 check]"; "anything which would indicate a violation of the mail fraud statute and the National Stolen Property Act"; "anything you could find in connection with the violation of the law for which he [petitioner] was then arrested." One of them also admitted that they were "searching for goods, wares, merchandise, articles, or anything in connection with the use of the mails to defraud, and also in connection with the violation of Section 415 of Title 18."

Suffice it to say that they found no checks. The agents admitted seizing seven pens, tissue paper and twenty-seven

pieces of celluloid, the latter being found wrapped in a towel in a drawer of the bedroom dresser. Petitioner charges, and it is undenied, that the agents also seized blank stationery of various hotels, blank ruled sheets of paper, several obsolete fountain pens, expense bills and receipts, personal letters, a bill of sale for petitioner's automobile, note books, address books and some mineral deeds.

Most significant of all, however, was the unexpected discovery and seizure, at the end of this long search, of a sealed envelope marked "George Harris, personal papers." This envelope, which was found in a dresser drawer beneath some clothes, contained eleven draft registration certificates and eight notices of draft classification. Petitioner was then charged with the unlawful possession, concealment and alteration of these certificates and notices and found guilty. Nothing has ever developed as to the forged $25,000 check, which was the basis of petitioner's original arrest. No evidence of the crimes charged in the warrants for arrest has been found; no prosecution of petitioner for those crimes has developed.

It is significant that the crime which was thus unexpectedly discovered—namely, the illegal possession of the draft certificates and notices—could not have been brought to light in this case through the use of ordinary constitutional processes. There was no *prima facie* evidence to support the issuance of a warrant for petitioner's arrest for the crime of possessing these items. Nor was there any probable cause or any basis for an oath or affirmation which could justify a valid search warrant for these items. Their presence in petitioner's apartment could be discovered only by making an unlimited search for anything and everything that might be found, a search of the type that characterizes a general search warrant or writ of assistance. And it was precisely that type of search that took place in this case.

The Court holds, however, that the search was justified as an incident to petitioner's lawful arrest on the mail fraud and stolen property charges. It is said that law enforcement officers have the right, when making a valid arrest, to search the place and to seize the fruits and instrumentalities of the crime for which the arrest was made. And since the search here was made, at least in part, to find the instrumentalities of the alleged crimes, the search was valid and petitioner cannot be heard to complain of what was found during the course of that search. This conclusion bears further analysis, however.

It is undoubtedly true that limited seizures may be made without the benefit of search warrants under certain circumstances where a person has been arrested in his home. Due accommodation must be made for the necessary processes of law enforcement. Seizure may be made of articles and papers on the person of the one arrested. And the arresting officer is free to look around and seize those fruits and evidences of crime which are in plain sight and in his immediate and discernable presence. *Weeks* v. *United States*, 232 U. S. 383, 392; *Agnello* v. *United States*, 269 U. S. 20, 30. But where no properly limited search warrant has been issued, this Court has been scrupulously insistent on confining very narrowly the scope of search and seizure. The mere fact that a man has been validly arrested does not give the arresting officers untrammeled freedom to search every cranny and nook for anything that might have some relation to the alleged crime or, indeed, to any crime whatsoever. Authority to arrest, in other words, gives no authority whatever to search the premises where the arrest occurs and no authority to seize except under the most restricted circumstances.

Illustrative of the strict limitations which this Court has placed upon searches and seizures without a warrant in connection with a lawful arrest are the three cases of *Marron* v. *United States*, 275 U. S. 192, *Go-Bart Co.* v. *United States*, 282 U. S. 344, and *United States* v. *Lefko-*

witz, 285 U. S. 452. In the *Marron* case, an individual was arrested while actually engaged in running an illegal saloon in pursuance of a conspiracy; a prohibition agent secured a warrant for a search of the premises and for the seizure of intoxicating liquors and articles for their manufacture. Liquor was found in a closet. While searching in the closet, the agents noticed a ledger showing inventories of liquor and receipts relating to the business. Alongside the cash register they found bills for utilities furnished to the premises. They took the ledger and the bills. This Court held that while the seizure of the ledger and bills could not be justified under the search warrant, because not mentioned therein, their seizure was proper as an incident to the arrest inasmuch as they were necessary to the carrying on of the illegal business.

The *Marron* case at first was widely misunderstood as having held that most of the restrictions had been removed on searches of premises incident to arrests. *United States* v. *Gowen*, 40 F. 2d 593; *United States* v. *Poller*, 43 F. 2d 911. This misunderstanding was removed by the *Go-Bart* case, which made it clear that the items seized in the *Marron* case were visible and accessible and in the offender's immediate custody; it was further pointed out that there was no threat of force or general search or rummaging of the place in the *Marron* case. The inherent limitations of the *Marron* holding were demonstrated by the facts and decision in the *Go-Bart* case. There the defendant Bartels was placed under lawful arrest in his office on a charge of conspiracy to sell intoxicating liquors. Gowen, the other defendant, arrived and he also was placed under lawful arrest. Gowen was then forced to open a desk and a safe, which were searched by the agents along with other parts of the office. A large quantity of papers belonging to the defendants was seized. This Court held that such a seizure was unconstitutional, the search being general and unlimited in scope and being undertaken in the hope that evidence of the crime might be found.

In the *Lefkowitz* case, the defendants were placed under lawful arrest in their office on a charge of conspiracy to violate the liquor laws. The arresting officers then proceeded to search the desks, the towel cabinet and the waste baskets, seizing various books, papers and other articles. All of this was done without a search warrant. Once again the Court held that the Constitution had been violated. It was pointed out that the searches were exploratory and general and made solely to find evidence of the defendant's guilt of the alleged conspiracy or some other crime; the papers and other articles seized were unoffending in themselves..

Tested in the light of the foregoing principles and decisions, the search in the instant case cannot be justified. Even more glaring than the searches in the *Go-Bart* and *Lefkowitz* cases, the search here was a general exploratory one undertaken in the hope that evidence of some crime might be uncovered. The agents were searching for more than the fruits and instrumentalities of the crimes for which the arrest was made. By their own repeated testimony, they were searching for "anything" in connection with the alleged crimes, for "anything" that would indicate a violation of the laws in question. And their seizure of the draft certificates and notices demonstrates that they were also on the lookout for evidence of any other crime. In the absence of a valid warrant, such an unlimited, ransacking search for "anything" that might turn up has been condemned by this Court in constitutional terms time and time again. Nothing in any of the previous decisions of this Court even remotely approves or justifies this type of search as an incident to a valid arrest; in this respect, today's decision flatly contradicts and, in effect, overrules the *Go-Bart* and *Lefkowitz* cases.

Moreover, even if we assume that the agents were merely looking for the fruits and instrumentalities of the crimes for which the arrest was made, the Constitution has been violated. There are often minute objects con-

nected with the commission of a crime, objects that can be hidden in a small recess of a home or apartment and that can be discovered only by a thorough, ransacking search. Where the discovery of such objects requires an invasion of privacy to the extent evident in this case, the dangers inherent in such an invasion without a warrant far outweigh any policy underlying this method of crime detection. A search of that scope inevitably becomes, as it has in this case, a general exploratory search for "anything" in connection with the alleged crime or any other crime—a type of search which is most roundly condemned by the Constitution.

Thus when a search of this nature degenerates into a general exploratory crusade, probing for anything and everything that might evidence the commission of a crime, the Constitution steps into the picture to protect the individual. If it becomes evident that nothing can be found without a meticulous uprooting of a man's home, it is time for the law enforcement officers to secure a warrant. And if such a search has any reasonableness at all, it is a reasonableness that must be determined through the informed and deliberate judgment of a magistrate. "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States* v. *Lefkowitz, supra*, 464.

To insist upon a search warrant in the circumstances of this case is not to hobble the law enforcement process. Here there was no necessity for haste, no likelihood that the contents of the apartment might be removed or destroyed before a valid search warrant could be obtained. Indeed, the agents did get a warrant to search petitioner's office and automobile. It would have been no undue burden on them to obtain a warrant to search the apartment, guarding it in the meantime. Certainly the Constitu-

tion is not dependent upon the whim or convenience of law enforcement officers. Search should not be made without a warrant, in other words, where the opportunity for the issuance of a warrant exists. *Carroll* v. *United States*, 267 U. S. 132, 156; *Taylor* v. *United States*, 286 U. S. 1, 6.

The decision of the Court in this case can have but one meaning so far as searches are concerned. It effectively takes away the protection of the Fourth Amendment against unreasonable searches from those who are placed under lawful arrest in their homes. Small, minute objects are used in connection with most if not all crimes; and there is always the possibility that some fruit of the crime or some item used in the commission of the offense may take the form of a small piece of paper. Using the subterfuge of searching for such fruits and instrumentalities of the crime, law enforcement officers are now free to engage in an unlimited plunder of the home. Some of them may be frank enough, as in this case, to admit openly that the object of their search is "anything" that might connect the accused with the alleged crime. Others may be more guarded in their admissions. But all will realize that it is now far better for them to forego securing a search warrant, which is limited in scope by the Fourth Amendment to those articles set forth with particularity in the warrant. Under today's decision, a warrant of arrest for a particular crime authorizes an unlimited search of one's home from cellar to attic for evidence of "anything" that might come to light, whether bearing on the crime charged or any other crime. A search warrant is not only unnecessary; it is a hindrance.

The holding that the search in this case was proper and reasonable thus, expands the narrow limitations on searches incident to valid arrests beyond all recognition. What has heretofore been a carefully circumscribed exception to the prohibition against searches without warrants has now been inflated into a comprehensive principle

of freedom from all the requirements of the Fourth Amendment. The result is that a warrant for arrest is the equivalent of a general search warrant or writ of assistance; as an "incident" to the arrest, the arresting officers can search the surrounding premises without limitation for the fruits, instrumentalities and anything else connected with the crime charged or with any other possible crime. They may disregard with impunity all the historic principles underlying the Fourth Amendment relative to indiscriminate searches of a man's home when he is placed under arrest. See *Boyd* v. *United States*, 116 U. S. 616, 624–632; *Weeks* v. *United States*, *supra*; *Byars* v. *United States*, 273 U. S. 28. They may disregard the fact that the Fourth Amendment was designed in part, indeed perhaps primarily, to outlaw such general warrants, that there is no exception in favor of general searches in the course of executing a lawful warrant for arrest. As to those placed under arrest, the restrictions of the Fourth Amendment on searches are now words without meaning or effect.

Nor is the flagrant violation of the Fourth Amendment in this case remedied by the fact that the arresting officers, during the course of their ransacking search, uncovered and seized certain articles which it was unlawful for petitioner to possess. It has long been recognized, of course, that certain objects, the possession of which is in some way illegal, may be seized on appropriate occasions without a search warrant. Such objects include stolen goods, property forfeited to the Government, property concealed to avoid payment of duties, counterfeit coins, burglar tools, gambling paraphernalia, illicit liquor and the like. *Boyd* v. *United States*, *supra*, 623–624; *United States* v. *Lefkowitz*, *supra*, 465–466; *Gouled* v. *United States*, 255 U. S. 298, 309. But the permissible seizure of such goods is necessarily dependent upon the seizure occurring (1) during the course of a reasonable, constitutional search, (2) as the result

of ready observance of the surrounding premises by the arresting officers, or (3) as the result of the use of such objects in the commission of a crime in the presence of the officers. Never has it been suggested by this Court that law enforcement officers can use illegal means to seize that which it is unlawful to possess. To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purposes of despotic power, but those methods cannot abide the pure atmosphere of a free society.

The seizure here, as noted, did not occur during the course of a reasonable, constitutional search. Nor did it result from the ready observance of the surrounding premises; the draft certificates and notices were discovered only after a most meticulous ransacking. It is said, however, that the possession of these items by petitioner constituted a continuing offense committed in the presence of the arresting officers. This may be a dialectical way of putting the matter, but it would not commend itself to the common understanding of men. From a practical standpoint, these certificates and notices were not being possessed in the presence of the officers. They were hidden away in the bottom of a dresser drawer beneath some clothes. No arresting officer could possibly be aware of their existence or location unless he possessed some supernatural faculty. Indeed, if an arresting officer is to be allowed to search for and seize all hidden things the possession of which is unlawful, on the theory that the possession is occurring in his presence, there would be nothing left of the Fourth Amendment. Law enforcement officers would be invited to ignore the right to privacy executing warrants of arrest and searching without restraint and without regard to constitutional rights for those hidden items which were being illegally "possessed" in their "presence."

The key fact of this case is that the search was lawless. A lawless search cannot give rise to a lawful seizure, even of contraband goods. And "good faith" on the part of the arresting officers cannot justify a lawless search, nor support a lawless seizure. In forbidding unreasonable searches and seizures, the Constitution made certain procedural requirements indispensable for lawful searches and seizures. It did not mean, however, to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment, has shown good police intentions to be inadequate safeguards for the precious rights of man. But the Court now turns its back on that history and leaves the reasonableness of searches and seizures without warrants to the unreliable judgment of the arresting officers. As a result, the rights of those placed under arrest to be free from unreasonable searches and seizures are precarious to the extreme.

Now it may be that the illegality of the search and of the seizure in this case leads to the immunizing of petitioner from prosecution for the illegal possession of the draft certificates and notices. But freedom from unreasonable search and seizure is one of the cardinal rights of free men under our Constitution. That freedom belongs to all men, including those who may be guilty of some crime. The public policy underlying the constitutional guarantee of that freedom is so great as to outweigh the desirability of convicting those whose crime has been revealed through an unlawful invasion of their right to privacy. Lawless methods of law enforcement are frequently effective in uncovering crime, especially where tyranny reigns, but they are not to be countenanced under our form of government. It is not a novel principle of our constitutional system that a few criminals should go free rather than that the freedom and liberty of all citizens be jeopardized.

It is likely that the full impact of today's decision will not be apparent immediately. Petitioner is not an important or notorious criminal; and the investigation may have been undertaken with the best of motives. But apart from the fact that the Constitution was designed to protect the unimportant as well as the important, including those of criminal tendencies, the implications of what has been done in this case can affect the freedom of all our people. The principle established by the Court today can be used as easily by some future government determined to suppress political opposition under the guise of sedition as it can be used by a government determined to undo forgers and defrauders. See *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203. History is not without examples of the outlawry of certain political, religious and economic beliefs and the relentless prosecution of those who dare to entertain such beliefs. And history has a way of repeating itself. It therefore takes no stretch of the imagination to picture law enforcement officers arresting those accused of believing, writing or speaking that which is proscribed, accompanied by a thorough ransacking of their homes as an "incident" to the arrest in an effort to uncover "anything" of a seditious nature. Under the Court's decision, the Fourth Amendment no longer stands as a bar to such tyranny and oppression. On the contrary, direct encouragement is given to this abandonment of the right of privacy, a right won at so great a cost by those who fought for freedom through the flight of time.

As Judge Learned Hand recently said, "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion." *United States* v. *DiRe*, 159 F. 2d 818, 820.

MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE join this dissent.

SUPREME COURT OF THE UNITED STATES

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[May 5, 1947.]

Mr. Justice Frankfurter, with whom Mr. Justice Murphy and Mr. Justice Rutledge concur, dissenting.

Because I deem the implications of the Court's decision to have serious threats to basic liberties, I consider it important to underscore my concern over the outcome of this case. In *Davis* v. *United States*, 328 U. S. 582, the Court narrowed the protection of the Fourth Amendment [1] by extending the conception of "public records" for purposes of search without warant.[2] The Court now goes far beyond prior decisions in another direction—it permits rummaging throughout a house without a search warant on the ostensible ground of looking for the instruments of a crime for which an arrest, but only an arrest, has been authorized. If only the fate of the Davises and the Har-

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] While this case presents a situation not involved in the *Davis* case, or in *Zap* v. *United States*, 328 U. S. 624, so that the Court's conclusion cannot rest on those cases, it is appropriate to note that neither of those cases carries the authority of a majority of the Court. Aside from the fact that a constitutional adjudication of recent vintage and by a divided Court may always be reconsidered, I am loath to believe that these decisions by less than a majority of the Court are the last word on issues of such far-reaching importance to constitutional liberties.

rises were involved, one might be brutally indifferent to the ways by which they get their deserts. But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance. Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends. The implications of such encroachment, however, reach far beyond the thief or the black-marketeer. I cannot give legal sanction to what was done in this case without accepting the implications of such a decision for the future, implications which portend serious threats against precious aspects of our traditional freedom.

If I begin with some general observations, it is not because I am unmindful of Mr. Justice Holmes' caution that "General propositions do not decide concrete cases." *Lochner* v. *New York*, 198 U. S. 45, 76. Whether they do or not often depends on the strength of the conviction with which such "general propositions" are held. A principle may be accepted "in principle," but the impact of an immediate situation may lead to deviation from the principle. Or, while accepted "in principle," a competing principle may seem more important. Both these considerations have doubtless influenced the application of the search and seizure provisions of the Bill of Rights. Thus, one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.

The provenance of the Fourth Amendment bears on its scope. It will be recalled that James Otis made his epochal argument against general warrants in 1761.[3] Otis' defense of privacy was enshrined in the Massachusetts Constitution of 1780 in the following terms:

> "XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws."

In the meantime, Virginia, in her first Constitution (1776), incorporated a provision on the subject narrower in scope:

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[3] For reports of Otis' famous argument, see 2 Adams, Works pp. 523–25; Tudor, Life of James Otis, c. VI; Quincy's Massachusetts Reports pp. 471 *et seq.* (see also pp. 51–55); American History Leaflets, No. 33. And see the tribute of John Adams to Otis, Samuel Adams, and Hancock in 8 Old South Leaflets p. 57 (No. 179).

"The seizure of the papers of Algernon Sidney, which were made use of as the means of convicting him of treason, and of those of Wilkes about the time that the controversy between Great Britain and the American Colonies was assuming threatening proportions, was probably the immediate occasion for this constitutional provision. See Leach v. Money, Burr. 1742; S. C., 1 W. Bl. 555, 19 State Trials, 1001, and Broom, Const. Law, 525; Entick v. Carrington, 2 Wils. 275; S. C., 19 State Trials, 1030, and Broom, Const. Law, 558; May, Const. Hist., ch. 10; Trial of Algernon Sidney; 9 State Trials, 817." Cooley, Principles of Constitutional Law (1st ed.) 212, n. 2.

> "SEC. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

When Madison came to deal with safeguards against searches and seizures in the United States Constitution, he did not draw on the Virginia model but based his proposal on the Massachusetts form. This is clear proof that Congress meant to give wide, and not limited, scope to this protection against police intrusion.

Historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American independence. John Adams surely is a competent witness on the causes of the American Revolution. And he it was who said of Otis' argument against search by the police, not unlike the one before us, "American independence was then and there born." 10 Adams, *Works* 247. That which lay behind immunity from police intrusion without a search warrant was expressed by Mr. Justice Brandeis when he said that the makers of our Constitution

> "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

To be sure, that was said by him in a dissenting opinion in which he, with Mr. Justice Holmes, Mr. Justice Butler and Mr. Justice Stone, applied the prohibition of the

Fourth Amendment to wiretapping without statutory authority. *Olmstead* v. *United States*, 277 U. S. 438, 478. But with only an occasional deviation, a series of decisions of this Court has construed the Fourth Amendment "liberally to safeguard the right of privacy." *United States* v. *Lefkowitz*, 285 U. S. 452, 464. (See an analysis of the cases in the Appendix to this opinion.) Thus, the federal rule established in *Weeks* v. *United States*, 232 U. S. 383, as against the rule prevailing in many States, renders evidence obtained through an improper search inadmissible no matter how relevant. See *People* v. *Defore*, 242 N. Y. 13, and Chafee, The Progress of the Law 1919–1922, 35 Harv. L. Rev. 673, 694 *et seq.* And long before the *Weeks* case, *Boyd* v. *United States*, 116 U. S. 616, gave legal effect to the broad historic policy underlying the Fourth Amendment.[4] The *Boyd* opinion has been the guide to the interpretation of the Fourth Amendment to which the Court has most frequently recurred.

It is significant that the constitution of every State contains a clause like that of the Fourth Amendment and often in its precise wording. Nor are these constitutional provisions historic survivals. New York was alone in not having a safeguard against unreasonable search and seizure in its constitution. In that State, the privilege of privacy was safeguarded by a statute. It tells volumes that in 1938, New York, not content with statutory

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[4] Compare the answers to certified questions given by this Court in *Gouled* v. *United States*, 255 U. S. 298, with the forecast made by a student of the subject of known partiality in favor of civil liberties. Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 385–87. As pointed out by Professor Zechariah Chafee, Jr., in each instance where the *Gouled* case differs from Mr. Fraenkel's forecast, "the court gave increased force to the constitutional guarantee." Chafee, The Progress of the Law 1919–1922, 35 Harv. L. Rev. 673, 699.

protection, put the safeguard into its constitution.[5] If one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society.

The Fourth Amendment, we have seen, derives from the similar provision in the first Massachusetts Constitution. We may therefore look to the construction which the early Massachusetts Court placed upon the progenitor of the Fourth Amendment:

> "With the fresh recollection of those stirring discussions [respecting writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted. This article does not prohibit

[5] It is not without interest to note the first appearance of provisions dealing with search and seizure in State constitutions: Alabama: I, 9 (1819); Arizona: II, 8 (1911); Arkansas: II, 9 (1836); California: I, 19 (1849); Colorado: II, 7 (1876); Connecticut: I, 8 (1818); Delaware: I, 6 (1792); Florida: I, 7 (1838); Georgia: I, 18 (1865); Idaho: I, 17 (1889); Illinois: VIII, 7 (1818); Indiana: I, 8 (1816); Iowa: I, 8 (1846); Kansas: I, 14 (1855); Kentucky: XII, 9 (1792); Louisiana: VII, Art. 108 (1864); Maine: I, 5 (1819); Maryland: Decl. of Rights, XXIII (1776); Massachusetts: I, Art. XIV (1780); Michigan: I, 8 (1835); Minnesota: I, 10 (1857); Mississippi: I, 9 (1817); Missouri: XIII, 13 (1820); Montana: III, 7 (1889); Nebraska: I, 7 (1875); Nevada: I, 18 (1864); New Hampshire: I, XIX (1784); New Jersey: I, 6 (1844); New Mexico: II, 10 (1910); North Carolina: Decl. of Rights, XI (1776); North Dakota: I, 18 (1889); Ohio: VIII, 5 (1802); Oklahoma: II, 30 (1907); Oregon: I, 9 (1857); Pennsylvania: Decl. of Rights, X (1776); Rhode Island: I, 6 (1842); South Carolina: I, 22 (1868); South Dakota: VI, 11 (1889); Tennessee: XI, 7 (1796); Texas: Decl. of Rights, 5 (1836), I, 7 (1845); Utah: I, 14 (1895); Vermont: I, XI (1777); Virginia: Bill of Rights, 10 (1776); Washington: I, 7 (1889); West Virginia: II, 3 (1861–63); Wisconsin: I, 11 (1848); Wyoming: I, 4 (1889).

> all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.' The legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law." *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329, 336.

The plain import of this is that searches are "unreasonable" unless authorized by a warrant, and a warrant hedged about by adequate safeguards. "Unreasonable" is not to be determined with reference to a particular search and seizure considered in isolation. The "reason" by which search and seizure is to be tested is the "reason" that was written out of historic experience into the Fourth Amendment. This means that, with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant.

It is noteworthy that Congress has consistently and carefully respected the privacy protected by the Fourth Amendment. Because they realized that the dangers of police abuse were persisting dangers, the Fathers put the Fourth Amendment into the Constitution. Because these dangers are inherent in the temptations and the tendencies of the police, Congress has always been chary in allowing the use of search warrants. When it has authorized them it has circumscribed their use with particularity. In scores upon score of Acts, Congress authorized search by warrant only for particular situations and in extremely restricted ways. Despite repeated importunities by Attorneys General of the United States, Congress long refused to make search by warrant generally available as a resource in aid of criminal prosecution. It did not do

so until the first World War, and even then it did not do so except under conditions carefully circumscribed.

The whole history of legislation dealing with search and seizure shows how warily Congress has walked precisely because of the Fourth Amendment. A search of the entire premises for instruments of crime merely as an incident to a warrant of arrest has never been authorized by Congress. Nor has Congress ever authorized such search without a warrant even for stolen or contraband goods. On the contrary, it is precisely for the search of such goods that specific legislative authorization was given by Congress. Warrants even for such search required great particularity and could be issued only on adequate grounds. (For a table of Congressional legislation, with indication as to its scope, see the Appendix to the dissenting opinion in the *Davis* case, 328 U. S. at 616.)

This is the historic background against which the undisputed facts of this case must be projected. For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights. How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature.

The Court's reasoning, as I understand it, may be briefly stated. The entry into Harris' apartment was lawful because the agents had a warrant of arrest. The ensuing search was lawful because, as an incident of a lawful arrest, the police may search the premises on which the arrest took place since everything in the apartment

was in the "possession" of the accused and subject to his control. It was lawful, therefore, for the agents to rummage the apartment in search for "instruments of the crime." Since the search was lawful, anything illicit discovered in the course of the search was lawfully seized. In any event, the seizure was lawful because the documents found were property of the United States and their possession was a continuing crime against the United States.

Much is made of the fact that the entry into the house was lawful. But we are not confined to issues of trespass. The protection of the Fourth Amendment extends to improper searches and seizures, quite apart from the legality of an entry. The Amendment asserts the "right of the people to be secure" not only "in their persons, houses," but also in their "papers, and effects, against unreasonable searches and seizures." It is also assumed that because the search was allegedly for instruments of the crime for which Harris was arrested it was *ipso, facto* justified as an incident of the arrest. It would hardly be suggested that such a search could be made without warrant if Harris had been arrested on the street. How, then, is rummaging a man's closets and drawers more incidental to the arrest because the police chose to arrest him at home? For some purposes, to be sure, a man's house and its contents are deemed to be in his "possession" or "control" even when he is miles away. Because this is a mode of legal reasoning relevant to disputes over property, the usual phrase for such non-physical control is "constructive possession." But this mode of thought and these concepts are irrelevant to the application of the Fourth Amendment and hostile to respect for the liberties which it protects. Due regard for the policy of the Fourth Amendment precludes indulgence in the fiction that the recesses of a man's house are like the pockets of the clothes he wears at the time of his arrest.

To find authority for ransacking a home merely from authority for the arrest of a person is to give a novel and ominous rendering to a momentous chapter in the history of Anglo-American freedom. An Englishman's home, though a hovel, is his castle, precisely because the law secures freedom from fear of intrusion by the police except under carefully safeguarded authorization by a magistrate. To derive from the common law right to search the person as an incident of his arrest the right of indiscriminate search of all his belongings, is to disregard the fact that the Constitution protects both unauthorized arrest and unauthorized search. Authority to arrest does not dispense with the requirement of authority to search.

But even if the search was reasonable, it does not follow that the seizure was lawful. If the agents had obtained a warrant to look for the cancelled checks, they would not be entitled to seize other items discovered in the process. *Marron* v. *United States*, 275 U. S. 192, 196.[6] Harris would have been able to reclaim them by a motion to suppress evidence. Such is the policy of the Fourth Amendment, recognized by Congress and reformulated in the New Rules of Criminal Procedure adopted only last year. See Rule 41 (e) superseding the Act of June 15, 1917, 40 Stat. 228, 229. The Court's decision achieves the novel and startling result of making the scope of search without warant broader than an authorized search.

These principles are well established. While a few of the lower courts have uncritically and unwarrantedly extended the very limited search without warrant of a person upon his lawful arrest, such extension is hostile to the policy of the Amendment and is not warranted by the precedents of this Court.

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[6] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

"It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. See Mr. Justice Miller, in *Boyd* v. *United States*, 116 U. S. 616, 638, 641. Thus, it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper. *E. g., Gouled* v. *United States*, 255 U. S. 298. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure, *e. g., Amos* v. *United States*, 255 U. S. 313; *Byars* v. *United States*, 273 U. S. 28; *Taylor* v. *United States*, 286 U. S. 1. And a search may be improper because of the object it seeks to uncover, *e. g., Weeks* v. *United States*, 232 U. S. 383, 393–94, or because its scope extends beyond the constitutional bounds, *e. g., Agnello* v. *United States*, 269 U. S. 20.

"The course of decisions here has observed these important distinctions. The Court has not been indulgent towards inroads upon the Amendment. Only rarely have its dicta appeared to give undue scope to the right of search on arrest, and *Marron* v. *United States*, *supra* [275 U. S. 192], is the only decision in which the dicta were reflected in the result. That case has been a source of confusion to the lower courts. Thus, the Circuit Court of Appeals for the Second Circuit felt that the *Marron* case required it to give a more restricted view to the prohibitions of the Fourth Amendment than that court had expounded in *United States* v. *Kirschenblatt*, 16 F. 2d 202, see *Go-Bart Co.* v. *United States*, *sub nom.*, *United States* v. *Gowen*, 40 F. 2d 593, only to find itself reversed here, *Go-Bart Co.* v. *United States*, *supra* [282 U. S. 344], partly on the authority of the *Kirschenblatt* decision which, after the *Marron* case, it thought it must disown. The uncritical application of the right of search on arrest in the *Marron* case has surely been displaced by *Go-Bart Co.* v. *United States*, *supra*, and even more drastically by *United States* v. *Lefkowitz*, *supra* [285 U. S. 452], unless one is to infer that an earlier case qualifies later decisions although these

later decisions have explicitly confined the earlier case." *Davis* v. *United States*, 328 U. S. at 612–13 (dissenting opinion).

It is urged that even if the search was not justified, once it was made and the illicit documents discovered, they could be seized because their possession was a "continuing offense" committed "in the very presence of the agents." Apparently, then, a search undertaken illegally may retrospectively, by a legal figment, gain legality from what happened four hours later. This is to defeat the prohibition against lawless search and seizure by the application of an inverted notion of trespass *ab initio*. Here an unconstitutional trespass *ab initio* retrospectively acquires legality. Thus, the decision finds satisfaction of the constitutional requirement by circular reasoning. Search requires authority; authority to search is gained by what may be found during search without authority. By this reasoning every illegal search and seizure may be validated if the police find evidence of crime. The result can hardly be to discourage police violation of the constitutional protection.

If the search is illegal when begun, as it clearly was in this case if past decisions mean anything, it cannot retrospectively gain legality. If the search was illegal, the resulting seizure in the course of the search is illegal. It is no answer to say that possession of a document may itself be a crime. There is no suggestion here that the search was based on even a suspicion that Harris was in possession of illicit documents. The search was justified and is justified only in connection with the offense for which there was a warrant of arrest. But unless we are going to throw to the winds the latest unanimous decisions of this Court on the allowable range of search without warrant incidental to lawful arrest, *Go-Bart Co.* v. *United States*, 282 U. S. 344, and *United States* v. *Lefko-*

witz, 285 U. S. 452, this was an unlawful search which rendered unavailable as evidence everything seized in the course of it. That the agents might have obtained a warrant to make the search only emphasizes the illegality of their conduct. In the words of Mr. Justice Holmes, speaking for the Court, the precious constitutional rights "against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. Nor does the fact that the goods seized are contraband make valid an otherwise unlawful search and seizure. *Agnello* v. *United States*, 269 U. S. 20. Indeed it was for contraband goods that search warrants, carefully hedged about, were first authorized by Congress.

The only exceptions to the safeguard of a warrant issued by a magistrate are those which the common law recognized as inherent limitations of the policy which found expression in the Fourth Amendment—where circumstances preclude the obtaining of a warrant (as in the case of movable vehicles), and where the warrant for the arrest of a person carries with it authority to seize all that is on the person, or is in such open and immediate physical relation to him as to be, in a fair sense, a projection of his person. That is the teaching of both the *Go-Bart* and the *Lefkowitz* cases, which effectually retract whatever may have been the loose consideration of the problem in *Marron* v. *United States*, 275 U. S. 192. Thus, the *Go-Bart* case emphasized that the things seized in the *Marron* case were "visible and accessible and in the offender's immediate custody." 282 U. S. 344, 358. By "immediate custody" was not meant that figurative possession which for some legal purposes puts one in "possession" of everything in a house. The sentence following that just quoted excludes precisely the kind of thing that was done here. "There was

no threat of force or general search or rummaging of the place." *Ibid.*

In our case, five agents came to arrest Harris on a charge of violating the Postal Laws and the National Stolen Property Act. Though the arrest was consummated in the living room, the agents were told to make "a thorough search" of the entire apartment. In the bedroom they lifted the carpets, stripped the bed-linen, turned over the mattress. They combed the contents of the linen closet and even looked into Harris' shoes. The Selective Service cards, the items whose seizure is here in controversy, were discovered only after agents tore open a sealed envelope labeled "personal papers" which they had found under some clothes in a drawer of a small bureau in the bedroom. If there was no "rummaging of the place" in this case it would be difficult to imagine what "rummaging of the place" means.

Again, in the *Lefkowitz* case, the *Marron* case was carefully defined and limited:

> "There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made." 285 U. S. at 465.

Surely no comparable situation is now here. There was no search warrant, no crime was "openly being committed" in the presence of the officers, the seized documents were not "in plain view" or "picked up by the

officers as an incident of the arrest." Here a "thorough search" was made, and made without warrant.

To say that the *Go-Bart* and the *Lefkowitz* cases—both of them unanimous decisions of the Court—are authority for the conduct of the arresting agents in this case is to find that situations decisively different are the same.

It greatly underrates the quality of the American people and of the civilized standards to which they can be summoned to suggest that we must conduct our criminal justice on a lower level than does England, and that our police must be given a head which British courts deny theirs. A striking and characteristic example of the solicitous care of English courts concerning the "liberty of the subject" may be found in the recent judgments in *Christie* v. *Leachinsky*. In that case the House of Lords unanimously ruled that if a policeman arrests without warrant, although entertaining a reasonable suspicion of felony which would justify arrest, but does not inform the person of the nature of the charge, the police are liable for false imprisonment for such arrest. These judgments bear mightily upon the central problem of this case, namely, the appropriate balancing, in the words of Lord Simonds, of "the liberty of the subject and the convenience of the police." *Christie* v. *Leachinsky*, [1947] 1 All E. R. 567, 576.[7]

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[7] The extent to which such subordination of the police to law finds support in informed English opinion is reflected by the comments of the Solicitors' Journal. After noting that, in the view of Lord Simon, "Any other general rule would be contrary to our conception of individual liberty, though it might be tolerated in the time of the *Lettres de Cachet* in the eighteenth century in France or under the Gestapo," the Journal observes: "The importance of the reaffirmation of this principle cannot be exaggerated. The powers of private persons to arrest where a felony has been committed and there is reasonable ground for thinking that the person detained has committed it are important now that crimes of violence are more numerous, and the statutory powers of arrest without warrant under,

217 Hans. Deb. (Commons) cols. 1303 et seq. (May 17, 1928), and 220 id. cols. 35 and 805 et seq. (July 20, 1928),

The English attitude was clearly evinced also in the famous *Savidge* case. "Both the original incident and its sequel illustrate the sensitiveness of English opinion to even a suggestion of oppression by the police." IV Reports of the National Commission on Law Observance and Enforcement ("Lawlessness in Law Enforcement") P. 261. For "the high standards of conduct exacted by Englishmen of the police" (*id.* at 259) see the debates in the House of Commons, 220 Hans. Deb. (Commons) cols. 35 and 805 *et seq.* (July 20, 1928), and the Report of the Tribunal of Inquiry on the *Savidge* case, Cmd. 3147, 1928. There are those who say that we cannot have such high standards of criminal justice because the general standards of English life ensure greater obedience to law and better law enforcement. I reject this notion, and not the least because I think it is more accurate to say that the administration of criminal justice is more effective in England because law enforcement is there pursued on a more civilized level.

Of course, this may mean that it might be more difficult to obtain evidence of an offense unexpectedly uncovered in a lawless search. It may even mean that some offenses may go unwhipped of the law. If so, that is part of the cost for the greater gains of the Fourth Amendment. The whole point about the Fourth Amendment is that "Its protection extends to offenders as well as to the law abiding," because of its important bearing in maintaining a free society and avoiding the dangers of a police state. *United States* v. *Lefkowitz*, *supra* at 464. But the impediments of the Fourth Amendment to effective law enforce-

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e. g., the Malicious Damage Act, 1861, the Larceny Act, 1916, the Curtis Act of 1876, and many other Acts are more used than is generally appreciated. Of no less importance in such times as these is the assertion of our individual liberties to counteract any tendency which may appear for police powers to be exceeded." 91 Solicitors' Journal 184–85 (April 12, 1947).

disregard of procedures imposed upon the police by the Constitution and the laws is too often justified on the score of necessity. This case is a good illustration how lame an excuse it is that conduct such as is now before us is required by the exigencies of law enforcement. Here there was ample opportunity to secure the authority of law to make the search and later authority from a magistrate to seize the articles uncovered in the course of the search. Taylor v. United States, 286 U. S. 1, 6; United States v. Kaplan, 89 F. 2d 869, 871.

mony is often rejected by juries precisely because of a widely entertained belief that illegal methods are used to secure testimony. Thus, dubious police methods defeat the very ends of justice by which such methods are justified. No such cloud rests on police testimony in England. Respect for law by law officers promotes respect generally, just as lawlessness by law officers sets a contagious and competitive example to others. See IV Reports of the National Commission on Law Enforcement and Observance ("Lawlessness in Law Enforcement") *passim*, especially pp. 190–92. Moreover, by compelling police officers to abstain from improper methods for securing evidence, pressure is exerted upon them to bring the resources of intelligence and imagination into play in the detection and prosecution of crime.

No doubt the Fourth Amendment limits the freedom of the police in bringing criminals to justice. But to allow them the freedom which the Fourth Amendment was designed to curb was deemed too costly by the Founders. As Mr. Justice Holmes said in the *Olmstead* case, "we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose." 277 U. S. at 470. Of course arresting officers generally feel irked by what to them are technical legal restrictions. But they must not be allowed to be unmindful of the fact that such restrictions are essential safeguards of a free people. To sanction conduct such as

this case reveals is to encourage police intrusions upon privacy, without legal warrant, in situations that go even beyond the facts of the present case. If it be said that an attempt to extend the present case may be curbed in subsequent litigation, it is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene. It is for this reason—the dangerous tendency of allowing encroachments on the rights of privacy—that this Court in the *Boyd* case gave to the Fourth Amendment its wide protective scope.

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the "Report upon the Illegal Practices of the United States Department of Justice," which aroused the public concern of Chief Justice Hughes[8] (then at the bar), and by the little book entitled "The Deportations Delirium of Nineteen-Twenty" by Louis F. Post, who spoke

[8] Address, Harvard Law School Centennial, June 21, 1920, *Some Observations on Legal Education and Democratic Progress*, p. 23: "We cannot afford to ignore the indications that, perhaps to an extent unparalleled in our history, the essentials of liberty are being disregarded. Very recently information has been laid by responsible citizens at the bar of public opinion of violations of personal rights which savor of the worst practices of tyranny."

For a contemporaneous judicial account of searches and seizures in violation of the Fourth Amendment in connection with the Communist raids of January 2, 1920, see Judge George W. Anderson's opinion in *Colyer* v. *Skeffington*, 265 F. 17.

with the authoritative knowledge of an Assistant Secretary of Labor.

More than twenty years ago, before democracy was subjected to its recent stress and strain, Judge Learned Hand, in a decision approved by this Court in the *Lefkowitz* case, expressed views that seem to me decisive of this case:

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203.

APPENDIX

Analysis of Decisions Involving Searches and Seizures, from *Weeks* v. *United States*, 232 U. S. 383, up to *Davis* v. *United States*, 328 U. S. 582.*

1. Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
Weeks v. *United States*, 232 U. S. 383 (1914).	Use of mails to distribute lottery tickets.	Arrested without a warrant and not during commission of crime.	Personal papers and lottery tickets, taken from defendant's home.	None.	None.	None.	District court had improperly admitted in evidence some of articles seized; conviction reversed.
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 (1920).	Contempt of court for failure to produce books and documents required by subpoena. (One of defendants was a corporation.) Order was based on evidence secured as indicated in columns 3–7.	No arrest.	Books and papers seized under color of invalid subpoena.	None.	do.	do.	Order directing production of evidence, which was based on knowledge secured in violation of Fourth Amendment, was error and conviction for failure to obey order reversed. White, C. J., and Pitney, J., dissenting.
Gouled v. *United States*, 255 U. S. 298 (1921).	Conspiracy and use of mails to defraud United States.	Indictment.	1 document taken from defendant's office.	3 of the papers. (The other was taken by stealth from the office by a government agent.)	do.	do.	On certification, held that papers were inadmissible. Search warrant may issue only when interest of public or complainant in the article is primary or when its possession is unlawful; it may not issue merely to secure evidence.
Agnello v. *United States*, 269 U. S. 313 (1921).	Removal of whiskey without payment of tax, sale of whiskey on which no tax had been paid.	do.	Whiskey in question, as result of search without a warrant in defendant's absence. Officers admitted by defendant's wife.	None.	do.	do.	Evidence improperly admitted, conviction reversed.
Amos v. *McDowell*, 274 U. S. 305 (1921).	Civil suit for return of property in hands of Assistant to Attorney General.	No arrest.	Plaintiff's books and papers had been stolen from plaintiff's possession by a party unrelated to the Federal Government.	do.	do.	do.	District court had held that retention of paper for use as evidence was in violation of Fourth and Fifth Amendments; this Court reversed. Brandeis and Holmes, JJ., dissenting.

* Cases cited but not immediately pertinent, see *Olmstead* v. *United States*, 277 U. S. 438; *Goldman* v. *United States*, 316 U. S. 129; *United States* v. *White*, 322 U. S. 694; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186.

APPENDIX—Continued

Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
[illegible] v. *United* [illegible] 262 U. S. 151 (3)	Violation of liquor laws. (Corporate and individual defendants; only latter, of course, were arrested.)	Warrants	Corporate papers and books	Corporate papers and books produced under subpoena	None	None	District court admitted evidence against both corporate and individual defendants. This Court affirmed.
[illegible] *United States*, 267 U. S. 132 (1925).	Transportation of alcoholic beverages.	Arrested during commission of crime	Alcoholic beverages	None	Whiskey uncovered during search of car in which it was being transported at time of arrest.	do	Evidence was properly admitted; conviction affirmed. (McReynolds and Sutherland, JJ., dissenting.)
[illegible] *United States*, 265 U. S. 498, 505 (25 cases)	1. Action for return of seized liquor	1. No arrest	1. Liquor	1. Liquor. (Warrant was directed to address not specifically stated to be that of building searched.)	1. None	1. None	1. Evidence properly secured and need not be returned.
	2. Possession of liquor in violation of Prohibition Act.	2. Information	2. Liquor	2. Liquor. (Warrant was directed to prohibition officer. Question of reasonable cause for its issuance was not left to jury.) Alcoholic wines.	2. None	2. None	2. Evidence properly secured and properly admitted by district court; judgment affirmed.
[illegible] *United States*, 278 U. S. 435 (1925).	Motion to quash search warrant.	No arrest.	Alcoholic wines.	Alcoholic wines.	None.	None.	Warrant properly issued on reasonable ground; refusal of district court to quash search warrant affirmed.
[illegible] *United States*, 274 U. S. 20 (1925).	Possession and sale of cocaine without registration or payment of tax.	Arrested during commission of crime.	Can of cocaine seized at home of one of defendants while he was being arrested several blocks away.	None.	do.	do.	Evidence improperly admitted; conviction affirmed by the C. C. A. here reversed.
[illegible] *United States*, 276 U. S. 28 (1927).	Possession of counterfeit alcoholic beverage stamps.	Indictment.	Counterfeit alcoholic beverage stamps.	No Federal warrant issued. But warrant was issued by state judge to state officers to search for liquor. Federal officer accompanied them on search and uncovered stamps.	do.	Counterfeit alcoholic beverage stamps. (See column 5.)	Conviction in district court affirmed in the C. C. A. here reversed, because evidence was improperly admitted.
[illegible] *United States*, 276 U. S. 95 (1927).	Possession of intoxicating liquor.	Information.	Intoxicating liquor.	Intoxicating liquor. (Most of liquor thus seized was immediately destroyed, with only samples retained for evidence.)	do.	None.	On certificate from C. C. A. after conviction, held that evidence was properly admitted. Butler, J., concurring in result.
[illegible] *States v. Lee* 274 U. S. 559 (1927).	Conspiracy to violate Prohibition Act.	Arrested while engaging in crime.	71 cases of grain alcohol. Cases were seized on American vessel more than 12 miles from shore.	None.	71 cases of grain alcohol.	do.	Defendant's conviction reversed by the C. C. A. on grounds of illegal search sustained by this Court.

(Page 2 of table.)

APPENDIX—Continued

1. Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
...ola v. United States, 275 U. S. 106 (1927).	Transportation of intoxicating liquor.	Arrested during commission of crime.	Intoxicating liquor.	None	The liquor	None	Conviction, affirmed by C. C. A., affirmed by this Court.
...ted States v. Berkeness, 275 U. S. 149 (1927).	Civil suit to abate nuisance.	No arrest	Liquor	Liquor. Warrant was invalid for failure of allegation of sale on the premises as basis for its issue.	None	do	District court judgment excluding evidence, affirmed by C. C. A., affirmed by this Court.
...ron v. United States, 275 U. S. 192 (1927).	Violation of Prohibition Act.	Indictment. (Crime committed in presence of arresting officers. Articles seized, as described in columns 4–7, were taken at time of arrest.)	Intoxicating liquor, ledger, and papers. (Ledger was in closet in back of bar which contained some of the liquor; papers (bills) were on table near cash register.)	The intoxicating liquor	Ledger and bills. Court held that, while seizure was not authorized by the warrant, ledger and bills were properly seized as within the "immediate possession and control" of offender.	See explanation in 282 U. S. at 358, that the articles "were visible and accessible" and that there was no "rummaging of the place." And see 285 U. S. at 465.	Evidence properly admitted, conviction sustained by C. C. A. affirmed here.
...ohio v. United States, 275 U. S. 310 (1927).	Transportation of intoxicating liquor.	Crime committed in presence of arresting officers (state police).	Intoxicating liquor	None	Liquor seized as result of search of car in which defendants were when arrested. But Court found no probable cause for arrest.	None	Evidence improperly admitted, conviction, affirmed by the C. C. A., reversed here.
...Bart Co. v. United States, 282 U. S. 344 (1931).	Possession, transportation, sale, etc., of intoxicating liquor.	Invalid warrant	Office papers and records secured by use of keys taken from defendants at time of their arrest, and on false statement that they had a warrant for the papers.	do	None. (See column 3.)	do	Evidence must be returned to defendants; judgments of district court and the C. C. A. reversed.
...ted States v. Lefkowitz, 285 U. S. 452 (1932).	Conspiracy to violate Prohibition Act, including use of premises for sale and solicitation of orders.	Warrant of U. S. Commissioner.	Variety of papers taken from desks, cabinets, and waste-basket. Among these papers were lists of names and addresses, stationery, bills directed to customers, letters of solicitation, etc.	do	None. (Papers in waste basket were, of course, in open view.)	do	District court denied motions for return of papers. C. C. A. reversed, and this Court affirmed judgment of C. C. A.
...dor v. United States, 86 F. (2d) 1 (1932).	Illegal possession of intoxicating liquor.	Arrest made on basis of evidence uncovered during search.	122 cases of liquor. Agents investigated and noticed odor of alcohol coming from garage. Defendant had been under suspicion. Agents broke into garage and uncovered cache of liquor. Defendant was arrested when he came to garage during search.	do	None	do	Evidence of seized liquor improperly admitted, conviction and C. C. A. affirmance reversed.

Possession and transportation of intoxicating liquor

Arrested during commission of crime

Intoxicating liquor

Intoxicating liquor uncovered during search of automobile reasonably believed to contain such contraband

Movable (Page 3 of table) vehicle authorizes search and probable cause. Evidence properly admitted

APPENDIX Continued

1. Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
(a) *United States*, 287 U. S. 124 (1932)	Unlawful manufacture and possession of liquor	Indictment	Still, its appurtenances, and 350 gallons of whiskey	Still, its appurtenances, and 350 gallons of whiskey. But warrant issued on mere allegations that defendant had been seen hauling cans often used for liquor, and bringing cane sugar onto premises, that full cans were removed from premises, and that odors of fumes of cooking mash were noticeable. There was no allegation of any sale on premises	None	None	Evidence of seized liquor properly admitted; conviction in trial court and affirmance of C. C. A. reversed. (Stone and Cardozo, JJ., dissenting.)
(b) *United States*, 287 U. S. 206 (1932)	Possession and sale of intoxicating liquor	Information	Intoxicating liquor	Intoxicating liquor. But warrant was invalid. When first issued, it was not executed within 10 days, reissued without new evidence or affidavits	do	do	Evidence of seized liquor properly admitted; conviction and its affirmance by C. C. A. reversed. (Mr. Justice Roberts filed concurring opinion; Stone and Cardozo, JJ., dissenting.)
(c) *United States*, 287 U. S. 241 (1932)	Importation of liquor without payment of import duties	Information filed after seizure		Intoxicating liquor. But warrant issued by state police at request of customs agent on mere allegation of belief by customs agent that defendant had violated tax law	do	do	Evidence of seized liquor properly admitted; conviction and affirmance by C. C. A. reversed.
(d) *United States*, 305 U. S. 251 (1938)	Possession and transportation of distilled alcohol on which tax had not been paid	Arrest during commission of crime	Distilled alcohol on which tax had not been paid	None	Liquor seized during search of car which officers had followed into garage adjoining defendant's house	do	Evidence properly admitted, convicted, and judgment of C. C. A. affirmed.